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Johnson v. State Appellant's Brief Dckt. 42857

IN THE SUPREME COURT OF THE STATE OF IDAHO

SARAH B. JOHNSON, Petitioner/Appellant, vs. STATE OF IDAHO, Respondent.	)	Supreme Court No. 42857-2015 Blaine County District Court Case No. CV-2014-353

OPENING BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

HONORABLE G. RICHARD BLEVIN
District Judge

Deborah Whipple, ISB No. 4355
Dennis Benjamin, ISB No. 4199
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 W. Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

ATTORNEYS FOR APPELLANT

Office of the Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-4534

ATTORNEY FOR RESPONDENT

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II. STATEMENT OF THE CASE

A. Nature of the case

In 2005, the District Court sentenced Sarah Johnson, then a juvenile, to two fixed life terms of imprisonment with a fifteen-year gun enhancement. She had been convicted following a jury trial of killing her parents.

The State could not produce DNA or fingerprint or blood evidence which connected Sarah to her parents' murders. However, the State did collect a great deal of DNA evidence which points to an unknown male or males who left his/their body tissue on the robe worn during the murders and blood on the rifle used for the murders. In addition, the killer or killers left other DNA evidence behind, including on a spent shell casing, the barrel of the rifle, inside the gloves the State associated with the murder and in other places which can now be tested and analyzed with techniques not available at the time of the trial. Sarah seeks testing of this evidence to establish her innocence.

While I.C. § 19-4902(b)-(g) provide for DNA testing in cases like Sarah's, where identity was at issue, the evidence has been subject to a sufficient chain of custody, the result of testing has the potential to produce new, noncumulative evidence that would show it is more probable than not that she is innocent, and the testing will produce admissible results under the Rules of Evidence, the District Court denied testing. The Court concluded, that even though the testing could reveal the source of the DNA on the robe, gun, spent shell casing, and in other relevant places, knowing the source would not prove that the source was the killer. The Court further concluded that because the jury convicted Sarah knowing that not all the DNA had been tested and knowing that none that was tested was Sarah's, Sarah can never meet the burden of showing

that testing has the potential to produce new, noncumulative evidence that would show it is more probable than not that she is innocent.

The question before this Court is whether DNA testing can ever be allowed in any case. Because, under the District Court's analysis in Sarah's case, in order to get testing, a petitioner must first prove, without being able to test the DNA, who contributed the DNA and prove that he/she was the killer; moreover, such proof can never be made if the petitioner has previously been convicted by a jury that was aware that there was untested DNA at the scene. If this is in fact the standard petitioners must meet to be granted testing, then testing is simply unavailable and I.C. § 19-4906 is meaningless.

In the second issue before this Court, Sarah seeks relief from the summary dismissal of several of her claims because they were raised in a successive petition. Sarah recognizes that *Murphy v. State,* 156 Idaho 389, 327 P.3d 365 (2014), decided during the pendency of her post-conviction case, overruled *Palmer v. Dermitt,* 102 Idaho 591, 635 P.2d 955 (1981). However, she maintains that she has raised genuine issues of material fact as to whether she was denied effective assistance of counsel at trial and on appeal in violation of the Sixth and Fourteenth Amendments and Idaho Constitution Article I, § 13, as pled in the second, third, and fourth causes of action in her amended petition. DNA R pp. 111-135. She further maintains that she has raised a genuine issue of material fact as to whether she was denied due process of law as guaranteed by the Fifth Amendment and Idaho Constitution Article I, § 13, when the State withheld material exculpatory evidence that fingerprints found on the rifle, scope, and ammunition box insert had been run through AFIS and matched to Christopher Hill. DNA R pp. 135-138. The District Court dismissed these claims based upon *Murphy, supra.* Sarah does not

waive these claims. To the contrary, she asks this Court to overrule *Murphy* and remand these claims because *Murphy* was wrongly decided and is an unwise relinquishment of state sovereignty over state cases.

Lastly, Sarah also sought post-conviction relief because the two juvenile fixed life sentences procedurally and substantively violate the Eighth Amendment's protection against cruel and unusual punishment. She asks this Court to conclude under *Miller v. Alabama,* ___ U.S. ___, 132 S.Ct. 2455 (2012), that her sentences violate the Eighth Amendment because, among other reasons, instead of treating her age as a mitigating factor, the sentencing court actually treated her age as an aggravating factor.

B. Procedural history

At age sixteen, Sarah, with no history of violence or lawbreaking of any sort, was accused of murdering her parents, Alan and Diane. Following a jury trial, she was convicted and sentenced to two fixed life terms with a fifteen-year firearm enhancement. DNA R p. 5; R 1 Vol. 1, pp. 14-16; *State v. Johnson,* 145 Idaho 970, 972, 188 P.3d 912, 914 (2008).[1]

Despite Sarah's request for an appeal, trial counsel failed to timely file. R 1 Vol. 1 pp. 32-33. Consequently, this Court dismissed the appeal. R 1 Vol. 1, pp. 207-08.

Sarah filed a petition for post-conviction relief. R 1 Vol. 1, pp. 14-27. The District Court

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[1] In this brief, the trial clerk's record is referred to as "T R;" the trial transcript is referred to as "T Tr.;" the trial exhibits are referred to "T Ex.;" the post-conviction clerk's record from the initial post-conviction case is referred to as "R1;" the transcript from the initial post-conviction case is referred to as "EH 1 Tr.;" the exhibits from the initial post-conviction case are referred to as "PC 1 Ex.;" the clerk's record from this DNA and successive post-conviction case is referred to as "DNA R;" the transcript from this DNA and successive post-conviction case is referred to as "DNA Tr." and the exhibits from this DNA and successive post-conviction case are referred to as "DNA Ex." The District Court took judicial notice of all prior proceedings. DNA Tr. 3/2/15 p. 5, ln. 11-25.

found ineffective assistance in the failure to file a timely notice of appeal and re-entered the judgment while staying consideration of the remaining claims. R 1 Vol. 1, pp. 212-218.

Sarah filed a timely notice of appeal from the re-entered judgment. However, appellate relief was denied. *State v. Johnson, supra.*

Post-conviction proceedings resumed; however, the District Court denied relief. Sarah appealed. *Johnson v. State,* 156 Idaho 7, 319 P.3d 419 (2014).

While that appeal was pending, Sarah filed the DNA and successive petition at issue here. DNA R pp. 3-83.[2] Sarah then filed an amended petition. DNA R pp. 99-159. Shortly, after that filing, the Supreme Court denied relief in the original post-conviction appeal. *Johnson v. State, supra.*

Sarah raised the following claims in the amended DNA and successive petition:

> 1) A request for DNA testing of evidence secured in her trial which was not subject to the testing now being requested because the testing was not available at the time of trial.
>
> 2) Ineffective assistance of counsel in violation of the Sixth Amendment and Idaho Constitution Art. I, § 13 in:
>
> > A) failing to file a motion to dismiss pursuant to *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333 (1988), following the State's denial of due process in discarding the comforter from the Johnsons' bed;
> >
> > B) failing to present evidence regarding Janet Sylton's parole status at the time of the Johnsons' murders;
> >
> > C) failing to object to prosecutorial misconduct through the trial;

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[2] Counsel originally filed the DNA and successive petition under the same case number as the original petition. The District Court later assigned the case a new number and filed the petition *nunc pro tunc* to the original date of filing. DNA R pp. 160-161.

D) failing to object to the jury's trip from Ada County to Bellevue, Idaho, to visit the Johnson house.

3) Denial of effective assistance of counsel in violation of the Sixth Amendment and Idaho Constitution Art. I, § 13 under *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039 (1984), as her counsel labored throughout the proceedings under an actual conflict of interest;

4) Denial of effective assistance on direct appeal as guaranteed by the Sixth Amendment and Idaho Constitution Art. I, § 13 in:

A. Failing to raise on appeal the District Court error in denying the motion to suppress the testimony of Malinda Gonzales;

B. Failing to raise on appeal that the fixed life sentences were both excessive and unconstitutional under the Eighth and Fourteenth Amendments and Idaho Constitution Art. I, § 6.

5) Denial of due process as guaranteed by the Fifth Amendment and Idaho Constitution Art. I, § 13 when the State withheld materially exculpatory evidence that the fingerprints found on the rifle, scope, and ammunition box insert had been run through AFIS and matched to Christopher Hill - *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963).

6) Violation of the Eighth Amendment procedurally and substantively by the imposition of two concurrent terms of fixed life, plus a firearm enhancement of 15 years. *Miller v. Alabama,* ___ U.S. ___, 132 S.Ct. 2455 (2012).

DNA R pp. 109-154.

The District Court dismissed the petition. DNA R pp. 236-253. The Court dismissed all claims except the DNA testing request and the Eighth Amendment claim on the basis of *Murphy v. State, supra.*[3] DNA R p. 240. The District Court dismissed some parts of the DNA testing request on the basis that comparison of previously tested but unidentified DNA samples with newly acquired DNA profiles would not utilize new techniques. DNA R p. 243. The Court

[3] Contrary to the District Court's understanding, Sarah never stipulated to the dismissal of any of her claims. DNA ROA; DNA Tr.

denied testing on the remaining DNA because it concluded that while further testing could determine the source of DNA samples found on the robe the State argued was worn by the killer, the gun used by the killer, the spent shell casing, and on other items associated with the murders, the knowledge of the source of the DNA would not make it more probable than not that Sarah is innocent. DNA R p. 247.

The Court denied the Eighth Amendment claim because Sarah did not raise it in prior proceedings. The Court further held that *Miller* has not been found retroactive and does not apply in Idaho. DNA R pp. 248-252.

Sarah filed a timely IRCP 59(e) motion to alter or amend. DNA R pp. 256-274.

The District Court denied the motion. DNA R pp. 339-344. The Court held that the DNA statute requires not that the testing could potentially produce evidence of actual innocence, but rather that the testing has the potential to produce new, non-cumulative evidence that would show that it is more likely than not that Sarah is innocent and that, based on the trial evidence, Sarah cannot meet this burden. DNA R pp. 341-342. The Court also stated that Sarah had conceded that requests to compare previously tested but unidentified DNA samples with newly acquired DNA and the expanded DNA databases were not cognizable under the post-conviction statute. DNA R p. 341, ftnt. 1. The Court also stated that it could not grant relief because "The amount of evidence against [Sarah], and the weight to be given to that evidence has been established at trial and in [Sarah's] first post-conviction case." In other words, Sarah cannot have DNA testing because the evidence at trial was sufficient to sustain the convictions. DNA R pp. 342-343.

Sarah filed a timely amended notice of appeal. DNA R pp. 345-350.

C. Statement of Facts

The State's theory was that Sarah, at age 16, became enraged over being grounded for a few days because she had been with her boyfriend Bruno Santos without permission. So, she murdered her parents. T Tr. Vol. 3, p. 1490, ln. 4-p. 1495, ln. 4.

The State offered that Sarah, who did not know how to load a bolt action rifle found a well-hidden rifle belonging to a renter living in an apartment above the family garage. She removed the scope, loaded the rifle, put on her bathrobe backwards, and went into her parents' bedroom in the early morning. Shooting left handed, although she is right handed, Sarah shot her sleeping mother in the head throwing blood and tissue throughout the bedroom and into the adjoining hallway. The State theorized that an unflappable Sarah then turned and shot her father as he walked toward her again projecting blood and tissue throughout the room and into the hallway. T Supp. Tr. p. 175, ln. 11-p. 218, ln. 10; p. 313, ln. 13 - p. 344, ln. 11.

The State examined Sarah repeatedly that day, but could not find any blood or tissue from either her mother or father on her body or clothing except for some blood on the bottom of her socks. T Tr. Vol. 3, p. 1551, ln. 7-9; p. 1577, ln. 14-17; p. 1612, ln. 5-7; p. 1772, ln. 4-5; p. 1818, ln. 15-p. 1819, ln. 16; p. 1858, ln. 10-13; Vol. 4, p. 2175, ln. 9-10; p. 2249, ln. 6-9; p. 2280, ln. 11-p. 2282, ln.12; Vol. 6, p. 3653, ln. 1-11; Vol. 7, p. 5032, ln. 19-24; Vol. 8, p. 5754, ln. 13. Vol. 8, p. 5560, ln. 9-21. This blood was consistent with Sarah's statement that she stepped on the bloody carpet in the hallway to escape the house after hearing gunshots. T Tr. Vol. 3, p. 1749, ln. 1 - p. 1750, ln. 1; p. 2099, ln. 23 - p. 2102, ln. 23; Vol. 4, p. 2430, ln. 11-13. The State also inspected the rifle and the crime scene obtaining 1900 latent prints and found none of Sarah's fingerprints in any incriminating places. T Tr. Vol. 5, p. 3018, ln. 14-15; p. 3068, ln.

9-21.

The State questioned Sarah repeatedly – even in the absence of counsel which Sarah had specifically requested – and even after Sarah had been given Ambien, which is a hypnotic which affects one's state of mind – and Sarah never confessed. T Tr. Vol. 1, p. 654, ln. 9 - p. 655, ln. 21; Vol. 3, p. 1544, ln. 3-12; p. 2106, ln. 1; Vol. 4, p. 2176, ln. 10-15; p. 2177, ln. 1- p. 2179, ln. 6-20; Vol. 4, p. 2424, ln. 20 -p. 2444, ln. 14; p. 2446, ln. 8 - p. 2454, ln. 19; p. 2488, ln. 2-14; Vol. 5, p. 3368, ln. 8 - p. 3371, ln. 5; p. 3377, ln. 1 - p. 3378, ln. 6.

The State explained the lack of blood on Sarah in a variety of ways. It speculated that Diane Johnson had tucked a comforter very tightly over her own head protecting Sarah from blood. T Tr. Vol. 3, p. 1986, ln. 23 - p. 1987, ln. 6; Vol. 4, p. 2313, ln. 6 - p. 2314, ln. 22. However, the State discarded this comforter and offered no explanation of why the comforter did not keep blood and tissue from going throughout the bedroom and hallway and onto the bathrobe but still protected Sarah. T Tr. Vol. 6, p. 4212, ln. 9-17. The State speculated that Sarah wore her bathrobe backwards protecting some of her body, but had no explanation for how Sarah avoided getting blood on her lower legs and face which were not covered by the robe. *Id.* While the State had no explanation for how Sarah avoided getting blood on her face, See T Tr, the State theorized that Sarah wore a shower cap to avoid getting blood on her hair. However, the State could not find a shower cap at the house and so posited that Sarah had flushed it down the toilet. The State did not explain how this did not clog the toilet and did not attempt to find the cap in the plumbing. T Tr. Vol. 8, p. 5871, ln. 11 - p. 5872, ln. 10; Supp. Tr. p. 324, ln. 23 - p. 325, ln. 2. The State explained the lack of fingerprints by theorizing that Sarah wore a combination of leather and latex gloves but did not explain how the gloves remained blood free and gunshot

residue free. T Supp. Tr. p. 175, ln. 11-p. 218, ln. 10; p. 313, ln. 13 - p. 344, ln. 11.

Sarah was convicted. The jury also found a firearm enhancement under the instructions which required that she, not someone else, had used the gun. T Tr. Vol. 8, p. 6174, ln. 23-p. 6175, ln. 22.

Well after the trial, the State learned that fingerprints on the rifle and scope matched Christopher Hill's prints. Hill was a friend of the renter with no connection to Sarah. However, the State withheld this information from Sarah. EH 1 Tr. p. 652, ln. 2-21; p. 654, ln. 2-22; p. 659, ln. 11-14.

During police questioning, Sarah reported a dispute her mother had with a cleaning woman, Janet Sylten, who had recently been paroled from prison on a violent battery offense. Sarah's account of the dispute was consistent with evidence the State got from other witnesses, including Sylten and her boss. Sarah also told the police that she and her family heard intruders in the yard shortly before her parents were killed and that the voices seemed to include Sylten's voice. Footprints in the yard were consistent with the presence of multiple people shortly before the murders. T Tr. Vol. 3, p. 1529, ln. 10 - p. 1532, ln. 24; p. 1561, ln. 4-22; p. 2095, ln. 6- p. 2098, ln. 9; Vol. 4, p. 2432, ln. 22 - p. 2436, ln. 6; p. 2695, ln. 16-24; p. 2811, ln. 1-p. 2815, ln. 22; p. 2824, ln. 1 - p. 2827, ln. 5; Vol. 5, p. 2836, ln. 25 - p. 2841, ln. 6; p. 2889, ln. 4-6; Vol. 6, p. 3764, ln. 7 - p. 3765, ln. 25; p. 3776, ln. 22 - p. 3779, ln. 24.

In her DNA and successive petition, Sarah sought testing of the following:

> a) Bloodstain 2 from the robe contains a mixture of at least three individuals including an unknown individual. This evidence may now be compared to a reference sample from Christopher Hill which was not available at the time of trial, and deduced profiles may be submitted to the State and federal CODIS databases.

b) The tissue from the left collar area of the robe is from an unknown male. Alan Johnson and Bruno Santos are excluded as potential contributors. This evidence may now be compared to a reference sample from Christopher Hill which was not available at the time of trial, and deduced profiles may be submitted to the State and federal CODIS databases.

c) Bloodstain C on the rifle is from an unknown male excluding Alan Johnson and Bruno Santos. This evidence may now be compared to a reference sample from Christopher Hill which was not available at the time of trial, and deduced profiles may be submitted to the State and federal CODIS databases.

d) No conclusions could be reached due to insufficient amounts of DNA concerning bloodstain 24 from the robe, the tissue from the lower left side of the robe, the tissue from the inside lower back of the robe, the tissue from the inside left sleeve of the robe, the stain from Bruno Santos' pants, the fibers imbedded in unknown material, bloodstain B from the rifle, and bloodstain G from the rifle. This evidence may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial and to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns, and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the State and federal CODIS databases.

e) Robe samples #24-30 were never analyzed and may now be subjected to DNA analysis. This evidence may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial and to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the State and federal CODIS databases.

f) The results from Robe sample 34, if any, are not listed on the Celmark DNA report. This evidence may now be tested using advanced amplification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the State and federal CODIS databases.

g) DNA from the unidentified fingerprint on the .264 round (Item # 14) may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the State and federal CODIS databases.

h) DNA from the unidentified fingerprints on the doorknob set on Diane and Alan Johnson's bedroom door (Items # 15-16) may now be tested using advanced techniques not available at the time of trial and compared to reference samples from the time of trial and after and submitted to a CODIS database.

i) DNA from the palm prints (Items 20-2 and 20-3) may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not fully available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the State and federal CODIS databases.

j) DNA from the print on the empty shell casing (Item 12-1) may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the State and federal CODIS databases.

k) One of the two hair samples recovered from the barrel of the .264 rifle could not be matched to Sarah or any of her maternal relatives by mitochondrial DNA testing. This hair can now be compared to a DNA reference sample from Christopher Hill which was not available at the time of trial.

l) Two of the three hairs removed from Bruno Santo's sweater were excluded as coming from Sarah and could not be identified as coming from a particular maternal line. These hairs can now be compared to a new DNA reference sample from Christopher Hill. One of the hairs also had a small root and could be analyzed using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference

sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the State and federal CODIS databases.

m) DNA from an unknown contributor found on the inside of the latex glove can now be analyzed using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not fully available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the State and federal CODIS databases.

n) Low levels of DNA from an unidentified source were found on the leather glove from the garbage can. That DNA can now be analyzed using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not fully available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the State and federal CODIS databases.

o) A bloody handprint was found on the sheet under the pillow beneath Diane. DNA from that handprint can now be amplified using new fingerprint DNA analysis to determine whether the handprint was made by Alan or some other person after Diane was shot. See T Tr. Vol. 6, p. 4238, ln. 25 - p. 4239, ln. 12.

DNA R pp. 105-109.

The District Court denied the testing and the Eighth Amendment claim and denied a subsequent IRCP 59(e) motion to reconsider. DNA R pp. 236-252; 339-343.

III. ISSUES PRESENTED ON APPEAL

1. Did the District Court err in failing to permit DNA testing? Specifically, did the Court err in concluding that comparison of previously obtained but unidentified DNA against Christopher Hill's DNA and the expanded government databases was not a new technology not

available at the time of trial? Further, did the Court err in its analysis of whether the result of the requested DNA testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that Sarah is innocent? And did the Court err in concluding that based on the trial evidence Sarah cannot ever show that she should be allowed DNA testing?

2. Should this Court overrule *Murphy v. State*, *supra,* as it is both manifestly wrong and an unwise relinquishment of state sovereignty? If so, should Claims 2-5, which were dismissed pursuant to *Murphy*, be remanded to the District Court to determine whether sufficient cause exists to allow the claims to be raised in a second petition?

3. Did the District Court err in dismissing the *Miller* claim as it was not waived, *Miller* applies retroactively to Idaho, and Sarah's sentence violates the Eighth Amendment as interpreted in *Miller*?

IV. ARGUMENT

A. The District Court erred in denying DNA testing

1. Standard of review

In deciding a motion for summary dismissal of a petition for post-conviction relief, the court must review the facts in a light most favorable to the petitioner. *Fields v. State,* 151 Idaho 18, 24, 253 P.3d 692, 698 (2011).

Interpretation of a statute is a question of law over which the appellate court exercises free review. *State v. McKean,* 159 Idaho 75, 78, 356 P.3d 368, 371(2015), citing *State v. Shackelford,* 155 Idaho 454, 457, 314 P.3d 136, 139 (2013).

2. Purpose of the DNA statute

The Legislature amended Idaho Code § 19-4902 in 2001 to allow post-conviction testing of DNA in appropriate cases. The statement of purpose reads in part:

> The purpose of this legislation is to allow for post-conviction DNA testing in appropriate cases. While prosecutors have been utilizing DNA technology for nearly a decade in seeking convictions, Idaho inmates have no statutory right to tests that *may* exonerate them. In the past decade DNA testing has resulted in the post-conviction exoneration of more than 65 individuals in the United States and Canada.

2001 Idaho Laws Ch. 317 (H.B. 242) (emphasis added).

To fulfill this purpose, the Legislature provided in § 19-4902(b) that the testing may be requested as to evidence that was secured in relation to the trial which resulted in conviction but "which was not subject to the testing that is now requested because the technology for the testing was not available at the time of trial."

The Legislature intended to allow testing in cases where the testing *may* exonerate the defendant. The Legislature did not intent to limit testing to only those cases where even prior to testing the defendant can show that the results *will* exonerate her.

The Legislature fulfilled its intent through two sets of requirements. The first set are those required to obtain testing, I.C. § 19-4902(e). That section provides:

> (e) The trial court shall allow the testing . . . upon a determination that:
>
> > (1) The result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent; and
> >
> > (2) The testing method requested would likely produce admissible results under the Idaho rules of evidence.

I.C. § 19-4902(e).

The second set of requirements applies once the testing has been completed:

> (f) In the event the fingerprint or forensic DNA test results demonstrate, in light of all admissible evidence, that the petitioner is not the person who committed the offense, the court shall order the appropriate relief.

I.C. § 19-4902(f).

To get testing, one must show that the technology for the testing was not available at the time of trial and that it has the scientific potential to produce new, noncumulative evidence that would show it is more probable than not that the petitioner is innocent. Thus, in *Fields v. State, supra,* testing was allowed and only after the testing did the District Court deny relief because the evidence resulting from the testing did not demonstrate that Fields was not the murderer.

3. Comparison of previously obtained but unidentified DNA against Christopher Hill's DNA and the expanded government databases is a new technology not available at the time of trial

The District Court denied some of the requested testing because, "[t]he existence of new DNA profiles with which to compare samples tested prior to trial by DNA technology existing at the time, does not satisfy the requirements of I.C. § 19-4902(b)." DNA R p. 243. This conclusion is without support in controlling case law and is contrary to the purpose of the DNA statute.

While I.C. § 19-4902(b) requires that "the technology for the testing was not available at the time of trial," the statute does not further define what that means. Sarah is unaware of any Idaho case law interpreting the meaning of the word "technology."

However, the meaning of new technology is clear under the well-known rule of statutory construction "[t]hat the language of a statute should be given its plain, usual and ordinary meaning." I.C. § 73-113; *Albee v. Judy*, 136 Idaho 226, 231, 31 P.3d 248, 253 (2001).

The word "technology," in this context, means "a manner of accomplishing a task especially using technical processes, methods, or *knowledge* <new *technologies* for information storage>." www.merriam-webster.com/dictionary/technology (emphasis on knowledge added, emphasis on technologies in original). While DNA testing was available at the time of the trial, new processes and methods of testing DNA and new knowledge about DNA, including the DNA profiles now available on CODIS and the DNA profile of Christopher Hill, are new technologies. Consequently, the "technology" Sarah proposes to use now was not available at the time of trial.

This construction of the statute is not only in accord with I.C. § 73-113 and *Albee v. Judy, supra.* It is also consistent with the legislative intent behind the statute. And, as noted by *State v. McKean, supra,* "The objective of statutory interpretation is to give effect to the legislative intent." *Id.,* citing *State v. Yzaguirre,* 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007).

The legislative purpose of the DNA statute is to allow testing in appropriate cases where the results of the testing may exonerate the defendant. (At the time the statute was first enacted, the legislature referred to 65 cases of DNA exoneration in the United States and Canada. Today that number is 330 in just the United States.[4] Defining new technology as the District Court did here so as to prohibit comparison of crime scene DNA profiles with newly obtained profiles of alternate perpetrators by eliminating the knowledge element from the definition of technology is inconsistent with the intent to make DNA exoneration available for the wrongly convicted in Idaho.

Sarah requests that this Court reverse the District Court's decision denying testing on the

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[4] http://www.innocenceproject.org/cases-false-imprisonment (Accessed September 1, 2015).)

basis that new CODIS and new potential perpetrator profiles are not new technology.

4. The District Court erred in its analysis of whether the result of the requested DNA testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that Sarah is innocent.

The Legislature intended to allow testing in cases where the testing *may* exonerate the defendant. The Legislature did not intend to limit testing to only those cases where even prior to testing the defendant can show that the testing *will* exonerate her.

To get testing, one must show that the testing has the scientific potential to produce new, noncumulative evidence that would show it is more probable than not that the petitioner is innocent. Thus, in *Fields v. State, supra,* testing was allowed and after the testing the District Court summarily denied relief because the evidence resulting from the testing did not demonstrate that Fields was not the murderer.

In this case, rather than waiting until after the testing to weigh the new evidence produced by the testing to see if the new evidence demonstrated that Sarah did not kill her parents, the District Court considered the evidence presented at trial and concluded that no DNA results could ever make it more probable than not that Sarah is innocent because the evidence was sufficient to support the convictions and the jury heard evidence that a person other than Sarah could have been the killer but convicted Sarah anyway. DNA R pp. 245-247.

Under this analysis, no petitioner can ever get DNA testing because no one can ever prove prior to the testing that the testing will demonstrate innocence and further every person convicted will have been convicted by a jury which rejected the theory that someone else was responsible for the crime. Indeed, identity must be an issue at trial in order to obtain DNA testing. I.C. § 19-4902(c)(1). Clearly, it was not the intent of the legislature to preclude any

defendant from ever getting DNA testing.

In denying testing, the District Court stated that Sarah's counsel "admitted at the 10/20/14 hearing that the standard required by I.C. § 19-4902(e)(1) has not been met." DNA R p. 247, ft. 8. What counsel said was this: "We are not in a position to say that the evidence will or will not, more probably than not, demonstrate the innocence of Ms. Johnson . . . but we need the testing." *Id.* Counsel merely made the commonsense observation that no one can know what the results of the testing will be until the testing is done. That was not an admission that the requested testing does not have the "scientific potential" to produce evidence of actual innocence. It was a request to permit such testing to see if the new DNA evidence is exonerating. *See Fields v. State,* 151 Idaho at 23-24, 253 P.3d at 697-98, noting that test results by themselves can never be exonerating. Rather, testing is to be allowed when it has the probability to produce evidence of innocence – the petitioner cannot show before the testing that the testing will prove innocence.

Sarah does not need to prove in advance of the testing what the results will be. A showing that the testing methods have the "scientific potential" to produce evidence of actual innocence is not the same as the showing of actual innocence based upon those test results. A reading of subsection (e)(1) that conflates the two concepts is contrary to the plain language of the statute and the interpretation of a statute must begin with the literal words of the statute. "[T]hose words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole." *Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 894, 265 P.3d 502, 506 (2011). Here there is no requirement in the text of the statute that the petitioner prove in advance what the results of the testing will turn out to be.

Further, that reading nullifies the statute because no petitioner could ever say that he or she knows what the testing will actually show. Even if it could be said that the statute is ambiguous, "[i]t is incumbent upon a court to give an ambiguous statute an interpretation which will not render it a nullity." *State v. Trusdall*, 155 Idaho 965, 969, 318 P.3d 955, 959 (Ct. App. 2014). What counsel was telling the Court is that Sarah "need[s] the testing" to produce the evidence which could show she is actually innocent in order to be granted appropriate relief under subsection (f) of the statute. She should be granted the testing due to the scientific potential of the advanced DNA testing to produce such evidence.

a. *Sarah has made the required showing under the facts of the case*

The advanced DNA testing has the scientific potential to produce new, non-cumulative evidence that would show that it is more probable than not that Sarah is innocent. I.C. § 19-4903(e). The DNA testing has the scientific potential to identify the person who fired the murder weapon. If that person is not Sarah, the DNA evidence would show that she is innocent of first-degree murder as charged and found by the jury.

The Court, however, found that DNA testing was not likely to produce proof of actual innocence due to "the 'mountain of evidence' against Johnson." DNA R p. 245. As set out above, weighing the evidence is not appropriate at this juncture. The Court does not have the DNA evidence to weigh. However, even if weighing the evidence was appropriate, the District Court's conclusion was incorrect.

The State's theory of the case was far-fetched: Sarah was so selfish, so obsessed with Bruno, and so enraged by being grounded that, even though she had never before committed any act of serious or gun violence against anyone, she stayed up all night plotting her parents'

murder. In a stroke of luck, she was grounded while the renter was out of town and on the night before the regular garbage collection day. Coming up with this plot on the fly, Sarah took the rifle, no one could say she even knew about, from its hiding place in the renter's quarters, wore some combination of three gloves without getting her fingerprints or any blood on any of them, took the scope off the rifle without harming fingerprints placed there by the last person to shoot the rifle, put on the robe and a shower cap, and shot her sleeping mother from a left-handed position, although she is right-handed and had never before shot a rifle. Not upset or deterred by the horrible result of the explosion of tissue and blood, she next shot her father in the chest while he tried to reach out to her. And, she miraculously avoided getting any blood or tissue on her pajama pants, gloves, hands, face, or hair. She flushed the shower cap down the toilet without getting any blood on herself and without causing any plumbing problems. She then cooly placed knives on the beds without getting her fingerprints or DNA on them. She then ran out of the house and put the robe and two of the three gloves in the garbage, again without getting blood from the robe on her hands. In a pretend hysteria, she sought "help" from the neighbors, all the while forgetting or not caring that she had left cartridges, her keys including a key to the renter's quarters, one of the gloves, and a pistol magazine in her bedroom, pistol ammunition in the robe, and a cartridge shell and another gun in the garage, and forgetting whether she wanted to tell the police that the door to her bedroom was open or closed at the time of the shootings. T Supp. Tr. p. 175, ln. 11 - p. 218, ln. 10; p. 313, ln. 13 - p. 344, ln. 11.

After all this, Sarah resisted confessing even when questioned without requested counsel and after being medicated. T Tr. Vol. 1, p. 654, ln. 9 - p. 655, ln. 21; Vol. 3, p. 1544, ln. 3-12; p. 2106, ln. 1; Vol. 4, p. 2176, ln. 10-15; p. 2177, ln. 1- p. 2179, ln. 6-20; Vol. 4, p. 2424, ln. 20 -p.

2444, ln. 14; p. 2446, ln. 8 - p. 2454, ln. 19; p. 2488, ln. 2-14; Vol. 5, p. 3368, ln. 8 - p. 3371, ln. 5; p. 3377, ln. 1 - p. 3378, ln. 6.

In addition, the evidence the District Court states "placed Johnson at the scene and linked her to the murders," DNA R p. 245, is not strong. Each area specifically listed by the Court is discussed below.

"Her stories were inconsistent and conflicted with the evidence." DNA R p. 245.

On the morning of the murders, within minutes of Sarah arriving in hysterics at the Richards' house, the police arrived. Throughout that day and the days to follow, Sarah was questioned numerous times. The questioning included two 20-minute interviews with Detective Harkins on the day her parents were killed, first at 8:30 a.m. and then at 11:30 a.m. Detective Harkins described the second interview as accusatory and said that he read *Miranda* warnings but he had to initial the form as Sarah was too upset to sign. T Tr. Vol. 3, p. 2106, ln. 1; Vol. 4, p. 2177, ln. 1- p. 2179, ln. 5. The next day, Sarah was questioned at the sheriff's office and her statements that she had an attorney went unheeded. T Tr. p. 2425, ln. 23 - p. 2444, ln. 14; p. 2488, ln. 2-14. She was again questioned without counsel on September 12 and 13 at the sheriff's office. T Tr. p. 2446, ln. 23 - p. 2452, ln. 1. On the 13th, the sheriff directly accused her of murdering her parents but she maintained her innocence. T Tr. p. 2446, ln. 8 - p. 2454, ln. 19.

At least two of the interviews on the day of her parents' deaths were conducted after Sarah had been given Ambien, a hypnotic which makes people suggestible, to calm her down. T Tr. Vol. 3, p. 1544, ln. 3-12; Vol. 4, p. 2176, ln. 10-15. Officer Tremble, who questioned Sarah after she had been given the Ambien, described her as "disoriented." T Tr. Vol. 3, p. 1870, ln. 8-14.

Throughout the questioning, Sarah remained consistent that she had been in bed, heard two shots, ran to her parents' bedroom door, called out, did not hear a response, fled, and heard the sliding screen door to the bedroom open and shut as she ran. T Tr. Vol. 3, p. 1749, ln. 1 - p. 1750, ln. 1; p. 2099, ln. 23 - p. 2102, ln. 23; Vol. 4, p. 2430, ln. 11-13.

Her statements both volunteered and in response to police questioning were not consistent in some details. Sometimes she said she was asleep when she heard the first shot; sometimes she said that she had been awakened by the shower before she heard the shot. T Tr. Vol. 3, p. 1749, ln. 1-2. Sometimes she said that she got out of bed upon hearing the first shot; sometimes she said that she stayed in bed until after hearing the second shot. T Tr. Vol. 3, p. 1749, ln. 12-17; p. 2101, ln. 5; Vol. 4, p. 2430, ln. 1-4. Sometimes she said that her bedroom door was open; sometimes she said that it was closed; and still other times she said that it was partly open. T Tr. Vol. 3, p. 2100, ln. 22-24; Vol. 4, p. 2428, ln. 12-13; p. 2492, ln. 13 - p. 2493, ln. 9. Sometimes she said that her parents' bedroom door was closed; sometimes she said that it was open. T Tr. Vol. 3., p. 1812, ln. 11-12; Vol. 4, p. 2430, ln. 15-19. (According to the State's expert, both bedroom doors had to be open. T Tr. Vol. 6, p. 4143, ln. 17-23.)

Sarah did not give inconsistent stories about what she was doing when her parents were killed. She said she was in her room in her bed when the first shot was fired, she went to her parents' room and called out, and then she fled. While some details within this statement changed, the thrust of the statement did not.

Anyone would have difficulty remembering details under such circumstances. It was no surprise and certainly not incriminating evidence that Sarah was unable to remember whether she was asleep or awake when the first shot was fired, the exact words that she said when she called

out, and whether the bedroom doors were open or closed.

If Sarah gave "inconsistent stories" about what she was doing it was more likely to be a result of the shock and distress felt by a girl who saw her family destroyed by another's crime than evidence of a carefully planned and cooly executed premeditated murder. Sarah's story would have been totally straight, well thought out and consistent over time had the crime described by the State actually taken place.

Much more remarkable is that Sarah never confessed or even made incriminating statements notwithstanding the best efforts of the State to obtain them. Sarah was particularly vulnerable to police interrogation techniques being only sixteen years old, of average or low average intelligence and ability to learn, with no prior experience with the police and now orphaned through a violent event. She maintained her innocence through repeated questioning. She was questioned by experts in interrogation repeatedly on the day she lost her parents. She was questioned in the absence of counsel. She was questioned right after having been given a hypnotic drug. She was questioned many times. She was accused of patricide and matricide. But, despite the State's very best efforts, she did not confess. T Tr. Vol. 1, p. 654, ln. 9 - p. 655, ln. 21; Vol. 3, p. 1544, ln. 3-12; p. 1749, ln. 1 - p. 1750, ln. 1; p. 2099, ln. 23 - p. 2102, ln. 23; p. 2106, ln. 1; Vol 4. p. 2176, ln. 10-15; p. 2177, ln. 1 - p. 2179, ln. 5; p. 2179, ln. 6-20; p. 2424, ln. 20 - p. 2425, ln. 12; p. 2425, ln. 23 - p. 2444, ln. 14; p. 2430, ln. 11-13; p. 2446, ln. 23 - p. 2452, ln. 1; p. 2446, ln. 8 - p. 2454, ln. 19; p. 2488, ln. 2-14; Vol. 5, p. 3368, ln. 8 - p. 3371, ln. 5; p. 3377, ln. 1 - p. 3378, ln. 6.

The evidence against Sarah was not overwhelming as has been asserted.

> "Her DNA was found in a latex glove, found wrapped in a blood splattered robe, and discarded in a trash can on the property." DNA R p. 245

While the State's DNA expert found DNA matching Sarah's on the latex glove, the glove was so old that it had become discolored and the expert could not say the DNA was of recent origin. T Tr. Vol. 5, p. 3110, ln. 1-3. The expert also found DNA from someone else, not matched to any known sample, on that glove. The contributor of that sample could have been male or female. T Tr. Vol. 5, p. 3110, ln. 17-20; p. 3120, ln. 17-20. There is no evidence that the latex glove was worn by Sarah on the morning of the murders and not at some other time in the far past.

Further, the gloves, unlike the rifle and the robe, did not have blood on them. According to the expert testimony and common sense, this means that they were not worn during the shooting. It is impossible that anyone wore the gloves in an environment where both the gun being held and the robe on the arms holding the gun got blood on them but the gloves remained pristine. This disproves the State's theory that Sarah was the shooter.

Finally, the presence of the gloves in Sarah's room and the garbage can outside is more consistent with an intent by the real killer to divert suspicion to Sarah than some theory that Sarah carefully plotted and planned the murders and then left gloves not even used in her room and the trash where they were quickly discovered by the police.

> "She knew where the murder weapon was kept (in a guest house safe) and had requested a key a few days earlier." DNA R p. 245

The murder weapon was not kept in the guest house safe. It was kept, covered by blankets, in a closet of the guest house. It was not in a safe. At trial, the renter testified that he kept the rifle in his closet along with three other guns. T Tr. Vol 4, p. 2702, ln. 8- p. 2703, ln. 2.

He also testified that Sarah had a garage door opener to the guest house and that the weapons and ammunition were in the closet when she cleaned his apartment and stayed there with friends. T Tr. Vol 4, p. 2693, ln.17-20; p. 2694, ln. 25-p. 2696, ln. 6; p. 2715, ln.12-25. While Sarah had cleaned the guest house, there was no evidence that she knew where the rifle was hidden nor is it likely she would be cleaning the inside of a closet. Sarah's half-brother, Matt Johnson, testified that he had been in the guest house after the renter had moved in but he did not know there were guns in the closet. T Tr. Vol. 7, pg. 4527, ln. 1-3. Likewise, family guests had stayed in the renter's quarters for multiple days using the closet just prior to the murders and they did not discover the hidden guns. T Tr. Vol. 7, p. 4525, ln. 22- p. 4527, ln. 16; Vol. 8, p. 5900, ln. 8-25.

Since there was no safe in the guest house, Sarah could not have asked for the key to the guest house gun safe. There was testimony that she asked for the key to the Johnsons' gun safe two days before her parents were murdered. However, Matt Johnson, as a witness for the State, testified that Sarah kept jewelry in the safe, an innocent reason for a request for the key. T Tr. Vol. 7, p. 4562, ln. 15-24.

The Court's analysis is also flawed because it evaluates the evidence both under a principal theory ("[T]he jury could have convicted Johnson if they believed that she was the shooter . . .") and as under an accomplice theory (". . . or if they believed that she aided and abetted the murder."). DNA R p. 245, ftnt. 5. In fact, however, the jury found that Sarah was the shooter because it returned the deadly weapon enhancement. The enhancement jury instruction required the jury to find Sarah possessed the weapon.[5] There is no accomplice liability for the

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[5] The Court's instruction was: "If you find the defendant guilty of murder, you must next consider whether *the defendant* displayed, used, threatened or attempted to use a firearm in the commission of the crime." T Tr. Vol. 9, pg. 6093, ln. 24 - pg. 6094, ln. 2 (emphasis added). The

firearm enhancement as it is a sentencing enhancement and not an offense itself. Thus, the jury must have unanimously found Sarah was the shooter and rejected the State's accomplice liability theory. In light of that, any new DNA evidence which shows that Sarah was not the shooter is evidence of innocence.

But even if an accomplice liability theory is considered, evidence showing who the shooter actually was would show innocence if that person were Bruno Santos or someone totally unconnected with Sarah, such as a member of a criminal gang with connections to Bruno.[6] Bruno testified at the criminal trial that he was not involved in the murder. T Tr. Vol. IV p. 2769, ln. 11-13. If his DNA or the DNA of one of his associates appears on the rifle or spent shell casings it would exonerate Sarah as the shooter. At the same time, it would exonerate her under an aiding and abetting theory as the State argued in closing argument at the criminal trial that Mr. Santos was not the one Sarah aided and abetted in the murder: "He's the reason for this. Again, Sarah's the means. The fact of the matter is we had an extensive investigation of his involvement." "If he's the killer, if he's the real murderer, is he going to come back [to the United States] voluntarily?" Supp. T., pg. 210, ln. 25 - pg. 211, ln. 24. The State cannot argue here that evidence that Bruno was the shooter would not exonerate Sarah when it argued at trial that Sarah did not aid and abet Bruno in the killings.

Court continued: "If you unanimously find beyond a reasonable doubt that *the defendant* used, displayed, threatened with or attempted to use a firearm in the commission of the above crime, then you must indicate on the verdict form submitted to you." T Tr. Vol. 9, pg. 6094, ln. 8-12 (emphasis added).

[6] Bruno is currently serving drug trafficking and delivery sentences at ISCC. He is not parole eligible until 2018, and his sentences will not expire until 2024. www.idoc.idaho.gov/content/prisons/offender_search/detail/99797

In addition, identifying a third-party DNA source other than Bruno from previously untested samples could make it more probable than not that Sarah is innocent. For example, the DNA testing has the scientific potential to show that Hill, whose fingerprints were found on the murder weapon, also loaded the weapon if, for example, his DNA is found on the spent cartridge. That evidence would exonerate Sarah because there is no link between her and Hill. Or, the DNA evidence could implicate someone else totally unconnected to Sarah. Evidence showing the shooter had no connection to Sarah would be evidence of innocence. Or there could be DNA from Sylten, the cleaning woman. See T Tr. Vol. 4, p. 2804, ln. 4-6. Sylten was released from prison on parole shortly before the murders. She had served some number of years (she claimed that she could not remember the details) for grand theft and battery on a correctional officer. T Tr. Vol. 4, p. 2824, ln. 1 - p. 2827, ln. 5; Vol. 5, p. 2889, ln. 4-6. After she cleaned the Johnson home, Diane Johnson discovered she was missing two expensive bottles of Estee Lauder lotion. When Diane alerted Sylten's employer about the missing items, she searched Sylten's living area and found lotions. She immediately fired Sylten. T Tr. Vol. 4, p. 2433, ln. 4-6; Vol. 6, p. 3764, ln. 7 - p. 3765, ln. 25. Of course, Sylten's parole could be revoked if it were discovered she had been stealing. The presence of Sylten's DNA would exonerate Sarah because there is no link between Sarah and Sylten.

b. *In fact, the evidence is far from overwhelming.*

The District Court overlooked substantial evidence showing that Sarah is innocent.

The State processed nineteen hundred latent fingerprints. Not one matched Sarah's. T Tr. Vol. 5, p. 3018, ln. 14-15; p. 3068, ln. 9-21.

The bedroom and hallway were "covered with blood and flesh and brain material running

up to the ceiling, across the ceiling of the bedroom, going towards the bathroom." T Tr. Vol. 3, p. 1658, ln. 11-17. "Things were dripping off the wall and off the ceiling on the floor." T Tr. Vol. 3, p. 1659, ln. 7-10. The State's expert testified that the explosion of Diane's head was a "massive amount of eruption" with "massive energy." He described bone and tissue "hitting and ricocheting off and coming back to that area. That's how powerful it gets." T Tr. Vol. 6, p. 4169, ln. 14-1; p. 4172, ln. 10-14. The forensic pathologist testified that Alan, having been shot in the lung, could have been coughing out blood in a high-velocity spatter. T Tr. Vol. 8, p. 5376, ln. 21-25. The State found blood on the robe from both Diane and Alan in patterns indicating that the blood was moving very quickly at high energy when it was deposited. T Tr. Vol. 6, p. 4205, ln. 9-17. The State's expert testified, "[O]ne thing, again, that can't ever be changed, it's a fact that can't be taken away, is the evidence that the robe is covered in a (sic) waist-down with the blood of Diane Johnson and Alan Johnson in a high velocity particulate." T Tr. Vol. 6, p. 4211, ln. 14-18. As the State's expert testified, 'The shooter in this case did block the [blood] spatter coming back, yes." T Tr. Vol. 6, p. 4251, ln. 5-6.

Further, the robe had gunshot residue on it. Supp. Tr. p. 206, ln. 24.

Yet, the State repeatedly inspected and tested Sarah's body and clothing, and she did not have any blood on her. T Tr. Vol. 3, p. 1818, ln. 15-p. 1819, ln. 16; p. 1858, ln. 10-13; Vol. 4, p. 2249, ln. 6-9, p. 2280, ln. 11-p. 2282, ln. 8; p. 2472, ln. 19-23; Vol. 6, p. 3653, ln. 1-11; Vol. 7, p. 5032, ln. 19-24; Vol. 8, p. 5754, ln. 13. Likewise, the State offered no proof that Sarah had gunshot residue on her body, hands or clothing.

The State found fibers on the rifle, but the fibers did not come from any material matched to Sarah's clothing or even anything in the Johnson household. T Tr. Vol. 6, p. 4243, ln. 12-14.

The State found a piece of male human tissue on the robe which did not belong to Alan Johnson or Bruno. T R Vol. 4, p. 1036. Some man, not Sarah, lost this tissue while wearing or in very close proximity to the robe.

As discussed earlier, the State posited that Sarah did not have blood on her because her mother had tucked a comforter tightly over her own head before she was killed. Supp Tr. p. 197, ln. 13-20. But, this did not explain why the robe, walls, ceiling and floor had blood on them. And, this did not explain how Diane could have or would have tucked a comforter over her own head so tightly that Officer Kirtley had to use force to pull it down. T Tr. Vol. 7, p. 5223, ln. 10-p. 5225, ln. 6. And, although the State did not collect the comforter as evidence, both Officer Kirtley and Stu Robinson, the officers in charge of the scene, testified that they did not see a bullet hole in it. This lack of a hole weakens the State's theory about the comforter protecting Sarah from blood and tissue. And, the State offered no explanation whatsoever as to why Alan's blood was on the rifle and robe, but not on Sarah. See Supp. Tr. p. 175, ln. 10-p. 218, ln. 10; p. 313, ln. 13-p. 344, ln. 12.

The State found the scope from the rifle used to kill the Johnsons on the bed in the rental quarters. T Tr. Vol. 3, p. 1842, ln. 16-18. The State found latent prints on the rifle, scope, and ammunition, and those prints are not Sarah's. The existence of the prints is inconsistent with the State's theory that Sarah used the rifle while wearing gloves, as the handling would have removed or obscured any older latent prints. T Tr. Vol. 5, p. 3028, ln. 10-12; p. 3044, ln. 15-21; p. 3052, ln. 11-21. Moreover, the latent prints were "fresh" and left by the last person to touch the scope and rifle. EH1 Tr. p. 849, ln. 3-p. 854, ln. 19.

The State did not have an overwhelming case against Sarah.

c. *Fields v. State is not apposite.*

Finally, the District Court's reliance on *Fields v. State*, *supra,* to deny testing is misplaced. In *Fields*, the victim was stabbed to death during a robbery. The District court permitted DNA testing of scrapings found under the victim's fingernails and of some hairs found on her clothing. The DNA profile obtained did not match Mr. Fields, but also could not be matched to any other person. Mr. Fields argued this showed he was actually innocent because the victim likely scratched the attacker and therefore the absence of his DNA proved he was not the killer. The Supreme Court held that DNA evidence was not sufficient to show that he was actually innocent. The Court said that, "Under Idaho Code § 19-4902(f), it is the fingerprint or DNA test results that must demonstrate that the petitioner is not the one who committed the offense. In this case there would have to be admissible evidence showing that the hairs or fingernail scrapings tested came from the murderer." 151 Idaho at 24, 253 P.3d at 698.

Sarah's case is in a totally different procedural posture because, unlike *Fields*, the District Court has not permitted the evidence to be tested.

Nevertheless, the District Court writes that, "[t]he same is true in this case. Further testing might reveal the source of the DNA samples found on Johnson's robe, on the gun, and elsewhere, but that knowledge does nothing to establish that the source of those samples was present in the Johnson home on the morning of the crime, that the source of those samples was the shooter, or that Johnson didn't aid and abet the murder of her parents." DNA R p. 247. In fact, however, whether further testing revealing the source of the DNA samples establishes any of those things depends on what evidence is found. If the piece of flesh with unknown male DNA found on the collar of the robe is Hill's, it had to have gotten there on the morning of the murders because Hill

was not otherwise at the house wearing the robe. Likewise, if it is his DNA in the fingerprints found on the cartridges still loaded in the rifle or on the spent shell casing, then he had to be the person who loaded the rifle before entering the house and firing the fatal shots. The DNA evidence would be corroborated by the fact that his fingerprints were found on the rifle and the scope which was removed just prior to the shootings. This evidence would exonerate Sarah both as the principal and as an accomplice because there is no reason to suspect the two acted in concert.

The same is true if the Bloodstain 2 from the robe has the DNA from Hill. That bloodstain could not have been placed at any time other than when the murders occurred.

Bloodstain C on the rifle is from an unknown male excluding Alan Johnson and Bruno Santos. The source of that bloodstain is either the shooter or someone present during the shootings. If that person has no connection to Sarah it shows her innocence both as a principal and an accomplice. The same is true concerning bloodstain 24 from the robe, the tissue from the lower left side of the robe, the tissue from the inside lower back of the robe, the tissue from the inside left sleeve of the robe, bloodstain B from the rifle, and bloodstain F from the rifle. And the same is true regarding the DNA from the unidentified fingerprints on the doorknob set on Diane and Alan Johnson's bedroom door and the unidentified palm prints. The same is true of the two hair samples recovered from the barrel of the .264 rifle which could not be matched to Sarah or any of her maternal relatives by mitochondrial DNA testing. If this hair came from Hill it was placed there at the time of the murder not when he was target shooting with the rifle many years prior as he claimed. Likewise, the DNA from an unknown contributor which was found on the inside of the latex glove can now be analyzed using advanced DNA amplification and purification

techniques. Assuming, as the District Court does, that evidence shows the identity of the shooter, if that DNA came from Hill, it would be exonerating to Sarah. She could have placed her DNA at anytime the glove was in the home but Hill's DNA could only have been placed there at the time of the murders as there is no evidence he used the glove prior to that day. The same is true regarding the low levels of DNA from an unidentified source that were found on the leather glove from the garbage can. If the DNA from the bloody handprint found on the sheet under the pillow beneath Diane Johnson is Hill's, it was placed there at the time of the murder. Most of the statements above can be repeated substituting the name Matthew Johnson or Janet Sylten or even Bruno Santos for Christopher Hill. Indeed, even if the for now unidentified DNA is from no one yet associated with the Johnson household, it will show who killed Alan and Diane.

Again, the District Court conflated the requirement under subsection (e)(1) that, in order to obtain testing, "the result of the testing has the scientific potential to produce new, non-cumulative evidence that would show that it is more probable than not that the petitioner is innocent," with the petitioner's ultimate burden of proof under subsection (f) that "the fingerprint or DNA evidence must demonstrate that the petitioner is not the person who committed the offense," which is to be applied as testing is completed. As previously stated by counsel, "we need the testing" to meet subsection (f), but, as *Fields* illustrates, Sarah can get the testing without showing what the results will ultimately be.

d. *Conclusion*

We cannot tell, at this point, whether the evidence will be of an unknown person as in *Fields* or a known person with no connection to Sarah but with a motive to commit the murders. If it is the former, that would be evidence of Sarah's innocence since we know that the jury found

her to be the shooter because of the jury's finding that she possessed a firearm during the commission of the offense. If the testing shows the latter, then Sarah is still likely to be able to meet her burden of proof under subsection (f). In either case, at this point we can say that the "the result of the testing has the scientific potential to produce new, non-cumulative evidence that would show that it is more probable than not that the petitioner is innocent" under subsection (e)(1).

This Court should reverse the District Court's orders denying testing.

B. This Court should overrule *Murphy v. State, supra.*, and remand claims 2-5

"Stare decisis requires that this Court follows controlling precedent unless that precedent is manifestly wrong, has proven over time to be unjust or unwise, or overruling that precedent is necessary to vindicate plain, obvious principles of law and remedy continued injustice." *State v. Owens*, 158 Idaho 1, 343 P.3d 30, 33-34 (2015). This is one of those rare cases.

The District Court dismissed Claims 2-5 because they were barred under *Murphy v. State, supra.*, which held that a claim of ineffective assistance of post-conviction counsel is not "sufficient reason" to permit the filing of a successive post-conviction petition. In so holding, *Murphy v. State*, *supra.*, upset 33 years of settled precedent by overruling *Palmer v. Dermitt*, 102 Idaho 591, 635 P.2d 955 (1981). Prior to *Murphy* and at the time Sarah filed her successive post-conviction petition, a petitioner could file a second petition if the claims raised were omitted from the original petition due to the ineffective assistance of post-conviction counsel. "In *Palmer*, this Court concluded that an allegation of ineffective assistance of prior post-conviction counsel may provide sufficient reason under § 19–4908 to permit allegations of error at trial not previously raised or inadequately raised in the initial application to be raised in a subsequent post-conviction

application." *Murphy v. State*, 156 Idaho at 394, 327 P.3d at 370.

In overruling *Palmer*, the Court reasoned that the underpinning for the *Palmer* rule had been undermined by subsequent cases which established that there was no right to the effective assistance of counsel.[7] It wrote, "Where there is no right to counsel, there can be no deprivation of effective assistance of counsel. Therefore, we overrule *Palmer* and hold that because Murphy has no statutory or constitutional right to effective assistance of post-conviction counsel, she cannot demonstrate sufficient reason for filing a successive petition based on ineffectiveness of post-conviction counsel." *Murphy v. State*, 156 Idaho at 395, 327 P.3d at 371.

1. *Murphy* should be overruled because it is manifestly wrong

Murphy is manifestly wrong because it interprets the statutory phrase "sufficient reason" to require a showing of a constitutional violation. Even assuming, *arguendo*, that there is no constitutional right to the effective assistance of post-conviction counsel, there is no textual reason to conclude that the Legislature intended the phrase "sufficient reason" to require the deprivation of a constitutional right. To the contrary, "[s]tatutory analysis 'must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not

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[7] The *Murphy* Court puts too much reliance on *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *Coleman v. Thompson*, 501 U.S. 722 (1991), for its conclusion that there is never a constitutional right to the effective assistance of post-conviction counsel. As the Supreme Court has clarified, *Coleman* "left open . . . a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Martinez v. Ryan*, — U.S. —, 132 S. Ct. 1309, 1315 (2012). Further, the *Martinez* Court noted that *Coleman* "suggested, though without holding, that the Constitution may require States to provide counsel in initial-review collateral proceedings" where such proceedings are the 'one and only appeal' as to an ineffective assistance claim . . . ." *Id.* In Idaho, ineffective assistance of trial counsel claims can realistically only be presented through a post-conviction petition.

construe it, but simply follows the law as written.'" *State v. Neal*, No. 42729, 2015 WL 6735793, at *4 (Idaho Nov. 4, 2015) *quoting Verska v. Saint Alphonsus Reg'l Med. Ctr., supra.* The plain, usual, and ordinary meaning of "sufficient cause" is that the circumstances surrounding the failure to do an act would make it inequitable to impose a sanction based upon that failure. For example, this Court held that "a demonstrated physical inability to perform the requested [alcohol concentration] test would be sufficient cause" to avoid a driver's license suspension for a refusal to submit to a blood alcohol concentration test. *Matter of Griffiths*, 113 Idaho 364, 372, 744 P.2d 92, 100 (1987) (fear of needles). The *Griffith* Court specifically rejected the argument that the driver would have to show a constitutional violation, *i.e.*, a "lack of probable cause or a violation of defendant's civil rights" in order to demonstrate "sufficient cause" for the refusal. 113 Idaho at 370, 744 P.2d at 98. *See also City of Boise v. Ada Cnty.*, 147 Idaho 794, 804, 215 P.3d 514, 524 (2009) ("As a general rule, a final order resulting in the imposition of an injunction will not be reconsidered except upon a showing of good and sufficient cause. Good cause may be established by proving, by a preponderance of the evidence, that a change in circumstances has rendered the original injunction inequitable.") (Internal citation omitted.) In another case, this Court has applied a "sufficient cause" standard without reference to a constitutional violation. *Loomis, Inc. v. Cudahy*, 104 Idaho 106, 111, 656 P.2d 1359, 1364 (1982) (sufficient cause to postpone arbitration hearing). And, it has found that "a breach of a duty" by the defendant to the plaintiff is required before "a sufficient cause of actionable negligence been made out." *McKinley v. Fanning*, 100 Idaho 189, 194, 595 P.2d 1084, 1089 (1979). Thus, there is no basis in the statutory language or the prior caselaw to support the *Murphy* Court's conclusion that a breach of duty by post-conviction counsel can never be "sufficient reason" to raise issues that attorney omitted in a

successive petition.

Further, the opinion in *Murphy* is illogical because it equates the absence of a constitutional cause of action with the absence of statutory sufficient cause. The two are not the same. The petitioner in *Murphy* was not alleging her conviction should be vacated due to the ineffective assistance of post-conviction counsel, she was only arguing she should be able to raise those claims a competent post-conviction attorney would have originally raised. The fact that there is no statutory or constitutional right to the effective assistance of counsel does not mean that the deficient performance of post-conviction counsel cannot be a gateway to filing a successive petition. In federal habeas cases, for example, there is no "actual innocence" cause of action, but a showing of actual innocence may allow a petitioner to overcome the statute of limitations or other procedural bars for seeking relief under the "miscarriage of justice" exception in federal court. *McQuiggin v. Perkins*, — U.S. —, 133 S. Ct. 1924, 1931 (2013); *House v. Bell*, 547 U.S. 518, 536-37, 126 S. Ct. 2064, 2076-77, 165 L. Ed. 2d 1 (2006)(showing of actual innocence acts as a gateway to defaulted claims). The absence of an "actual innocence" cause of action does not mean that it cannot be the basis for a finding that it would be a "miscarriage of justice" to bar the petition from presenting claims to the court. Substitute "ineffective assistance of counsel" for "actual innocence" and "sufficient cause" for "miscarriage of justice" and the same is true here. (The reasoning in the Nevada Supreme Court's opinion in *Bejarano v. Warden*, 112 Nev. 1466, 929 P.2d 922, 925 (1996), which the *Murphy* Court found "persuasive," suffers from the same logical error. 156 Idaho at 394, 327 P.3d at 370.)

Further, there is no reason to believe that the *Palmer* Court based its ruling on a belief that there was an ineffective assistance of post-conviction counsel cause of action. The basis for the

ruling was that Palmer's claims had not been knowingly abandoned by him and *that* was "sufficient reason." The *Palmer* Court wrote:

> The allegations of ineffective assistance of prior postconviction counsel, if true, *would warrant a finding that the omission in the prior postconviction proceeding of the allegations now being raised anew by Palmer was not a result of an active, knowing choice made by Palmer through this prior court-appointed attorney, and would therefore provide sufficient reason* for permitting the newly asserted allegations to be raised in the instant petition. Other jurisdictions have similarly held that a claim of ineffective assistance of appellate counsel or prior postconviction counsel provides sufficient reason to permit newly asserted allegations to be raised in a subsequent postconviction proceeding. *See Sims v. State*, 295 N.W.2d 420 (Iowa 1980); *Curtis v. State*, 37 Md.App. 459, 381 A.2d 1166 (1978) *rev'd on other grounds*; *Stewart v. Warden*, Nevada State Prison, 92 Nev. 588, 555 P.2d 218 (1976).

Palmer v. Dermitt, 102 Idaho at 596, 635 P.2d at 960 (emphasis added). It is worth noting that none of the cases cited by *Palmer* relied upon the idea that ineffective assistance of post-conviction counsel was a constitutional cause of action. In fact, the Maryland Court expressly stated that "[t]here is no constitutional right to post conviction relief[.]" *Curtis v. State*, 381 A.2d at 1170. Thus, *Murphy* overruled *Palmer* based upon an incorrect understanding of the basis of its ruling.

Also, an unbending rule that the ineffective assistance of post-conviction counsel may never be a "sufficient reason" is also inconsistent with the discretional nature of the sufficient reason inquiry. *See Kolp v. Bd. of Trustees of Butte Cnty. Joint Sch. Dist. No. 111*, 102 Idaho 320, 324, 629 P.2d 1153, 1157 (1981) (Mandamus action to challenge school board's determination that there was "sufficient cause" to discharge a teacher improper because that determination requires the exercise of discretion for which mandamus ordinarily will not lie.)

Finally, *Palmer* is consistent with the intent of the Uniform Law. Idaho's post-conviction

statute, I.C. §§ 19-4901 through -4911, is derived from the first revised version (1966) of the Uniform Post-Conviction Procedure Act. With regard to section 8 of the 1966 Uniform Act (which appears as section 19-4908 of the Idaho Code), the Commissioners made it clear that successive petitions should be liberally permitted:

> The Supreme Court has directed the lower federal courts to be liberal in entertaining successive habeas corpus petitions despite repetition of issues, *Sanders v. United States*, 373 U.S. 1 (1963). By adopting a similar permissiveness, this section will postpone the exhaustion of state remedies available to the applicant which *Fay v. Noia*, 372 U.S. 391 (1963), holds is required by statute for federal habeas corpus jurisdiction, 28 U.S.C. § 2254. Thus, the adjudication of meritorious claims will increasingly be accomplished within the state court system.

1966 UPCPA § 8 cmt., U.L.A. app. II (parallel citations omitted). Accordingly, I.C.§ 19-4908 should be construed in favor of having petitioners' claims considered on their merits. *Palmer* was consistent with the drafter's intent. *Murphy* is what the drafters wanted to avoid. *Palmer*'s interpretation of the "sufficient reason" standard of I.C. § 19-4908 was correct when decided and subsequent events did not change that.

In light of the above, it is manifest that *Murphy* was wrongly decided and this Court should overrule it.

2. *Murphy* should be overruled because it is unwise

In addition, *Murphy* is unwise because it shifts the duty of adjudicating state cases to the federal court. As recently observed by Chief Federal District Judge Winmill:

> Idaho's Uniform Post–Conviction Procedure Act generally requires that all claims be raised in the initial postconviction petition. *See* Idaho Code § 19–4908. However, the statute allows for claims to be raised in a successive petition if the petitioner shows "sufficient reason" why the claim was not raised, or was inadequately raised, in the initial petition. Petitioner's argument regarding postconviction counsel's failure to amend the initial postconviction petition was directed at this exception to the general procedural rule that all claims not raised in

> an initial petition are deemed waived.
>
> At the time of Petitioner's postconviction proceedings, Idaho courts had long held that ineffective assistance of initial postconviction counsel could constitute a "sufficient reason" under § 19–4908 to allow a petitioner to raise a claim in a successive petition. *See Palmer v. Dermitt*, 635 P.2d 955, 959–60 (Idaho 1981), *overruled by Murphy v. State*, No. 40483, — P.3d —, 2014 WL 712695 (Idaho Feb. 25, 2014).
>
> But the Idaho Supreme Court recently reversed course. In *Murphy*, the court surveyed what it believed to be the current state of federal law on the subject of ineffective assistance of postconviction counsel and determined that, in accord with such law, "sufficient reason" under § 19–4908 does not include ineffective assistance of postconviction counsel. *Murphy*, 2014 WL 712695 at *5. *Though the Idaho Supreme Court correctly stated that there is no federal constitutional right to postconviction counsel, it did not discuss the fact that under more recent federal habeas law, a petitioner may, in fact, assert ineffective assistance of initial postconviction counsel as cause to excuse the procedural default of claims of ineffective assistance of trial or appellate counsel. See Martinez v. Ryan*, 132 S.Ct. 1309 (2012); *Trevino v. Thaler*, 133 S.Ct. 1911 (2013); *Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir.2013) (applying Martinez to underlying claims of ineffective assistance of appellate counsel).

Veenstra v. Smith, No. 1:11-CV-00632-BLW, 2014 WL 1270626, at *3 (D. Idaho Mar. 26, 2014) (unpublished).

The unintended consequence of *Murphy* is that it has given the federal courts the opportunity to decide state ineffective assistance of trial and appellate counsel claims as an original matter, when under *Palmer* the claims would have had to be raised in a successive petition and ruled upon by the state courts before they could be raised in federal court. As a matter of state judicial policy, state trial courts should be resolving allegations that state trials were not fair. State appellate courts should review those rulings. And, the federal courts should only overturn those decisions when petitioners can overcome the highly deferential standard of

federal court review applied to exhausted claims. See 28 U.S.C. 2254(d)[8]. However under *Murphy*, ineffective assistance claims, which would have previously been decided in state court, are now being raised in federal court under *Martinez*. And, the federal court may review these claims *de novo* because there are no state courts findings of facts or conclusions of law for the federal court to defer to.

As Judge Winmill explains:

> *Martinez v. Ryan* worked a "remarkable" equitable change in the law governing procedurally defaulted ineffective assistance of counsel claims. *See Lopez v. Ryan*, 678 F.3d 1131, 1136 (9th Cir.2012). *Martinez* altered the long-standing prohibition of *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), that post-conviction counsel's ineffectiveness could not be used to excuse the procedural default of a claim. *In effect, Martinez created the potential for an exception to the overall ban on new evidence in § 2254 actions* that was pronounced in *Cullen v. Pinholster*, —U.S. —, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (interpreting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)). *Martinez makes it possible for procedurally defaulted ineffective assistance of trial counsel claims to be heard de novo, with new supporting evidence, on federal habeas corpus review. See Dickens v. Ryan,* 740 F.3d at 1320 ("We reject any argument that *Pinholster bars* the federal district court's ability to consider Dickens's 'new' IAC claim." In addition, "*Pinholster* says nothing about whether a court may consider a 'new' claim, based on 'new' evidence not previously presented to the state courts.

Row v. Beauclair, No. 1:98-CV-00240-BLW, 2015 WL 1481416, at *2 (D. Idaho Mar. 31, 2015) (unpublished) (emphasis added).

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[8] That provision states,

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

It is unwise relinquish state sovereignty by letting the federal courts do the work the state courts have traditionally done and allowing the federal courts to hear evidence never presented to the state court and using that evidence to rule on claims never presented to the state courts. This Court should restore the proper division of authority between the state and federal systems. *Murphy* should be overruled so that state court petitioners may file a successive state petition presenting claims which were omitted from the original petition due to the ineffective assistance of post-conviction counsel as they could under *Palmer*.

3. Claims 2-5 should be remanded for further proceedings

If *Murphy* is overruled, the Court should remand claims 2-5 so the District Court may determine whether sufficient reasons exists to raise them in this successive petition.

C. The District Court erred in dismissing the *Miller* claim

As noted above, the District Court denied the Eighth Amendment claim because Sarah did not raise it in prior proceedings. It further held that *Miller* has not been found retroactive and moreover does not apply in Idaho. DNA R pp. 248-252.

1. Standard of review

Interpretation of a statute is a question of law over which the appellate court exercises free review. *State v. McKean, supra.* Questions of constitutional interpretation are reviewed *de novo. See State v. Doe,* 140 Idaho 271, 273, 92 P.3d 521, 523 (2004).

2. The *Miller* claim was not waived

Sarah did not waive her Eighth Amendment claim by not raising it in her direct appeal or first post-conviction petition. The claim is based upon the Supreme Court's opinion in *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455 (2012), which was not decided until June 25, 2012, six years

after Sarah filed her original petition for post-conviction relief (CV-2006-324) on April 19, 2006, and four years after the opinion in her direct appeal was issued. In fact, judgment was entered by the District Court in the post-conviction proceeding on April 8, 2011, and the case was on appeal before this Court when *Miller* was issued. Clearly, she could not have raised her *Miller* claim on direct appeal or in her first petition.

Sarah filed this case on April 9, 2012, two months before *Miller* was decided. And she raised her *Miller* claim when she filed her Amended DNA and Successive Petition for Post-Conviction Relief on January 22, 2014, while the appeal in her first post-conviction case was still pending. (This Court did not issue its opinion in the appeal from the first petition until February 20, 2014, and the case was not remitted until March 26, 2014.)

Since Sarah filed this petition prior to the final decision in her original petition, this petition is timely. As set out in *Schwartz v. State,* 145 Idaho 186, 177 P.3d 400 (Ct. App. 2008):

> The statute of limitation for post-conviction actions provides that an application for post-conviction relief may be filed at any time within one year from the expiration of the time for appeal or from the determination of appeal or from the determination of a proceeding following an appeal, whichever is later. The appeal referenced in that section means the appeal in the underlying criminal case. The failure to file a timely application is a basis for dismissal of the application. However, if an initial post-conviction action was timely filed and has been concluded, an inmate may file a subsequent application outside of the one-year limitation period if the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

145 Idaho at 189, 177 P.3d at 403 (internal quotations and citations omitted). The successive petition must be filed within a reasonable amount of time. What is a reasonable amount of time is to be considered on a case by case basis. *Id.,* at 190, 177 P.3d at 404, citing *Charboneau v. State,* 144 Idaho 900, 905, 174 P.3d 870, 875 (2007). However, the Court of Appeals has found that a

successive petition filed one year after the decision on the appeal from the original petition was timely. *Hernandez v. State*, 133 Idaho 794, 799, 992 P.2d 789, 794 (Ct. App. 1999). Here Sarah raised her *Miller* claim *before* her post-conviction appeal was decided and is timely under *Hernandez*. Moreover, she amended her successive petition in a reasonable amount of time as the State had not yet filed an answer and she was permitted to amend the petition as a matter of course. I.R.C.P. 15(a).

Further, the fact that *Miller* was not decided until after both her original and successive petition had been filed is "sufficient reason" to permit her to raise the claim in her amended successive petition under I.C. § 19-4908. As explained in detail below, *Miller* created a substantive change in Eighth Amendment law, especially as the cruel and unusual punishment clause had been interpreted in Idaho. For example, this Court affirmed the imposition of a fixed-life sentence on a sixteen-year-old defendant in *State v. Windom*, 150 Idaho 873, 253 P.3d 310 (2011). In doing so, the Court held that "the nature and the gravity of the underlying offense may, standing alone, be sufficient to justify a determinate life sentence." 159 Idaho at 880, 253 P.3d at 317. That position was squarely rejected by the *Miller* Court as it applies to fixed life sentences imposed upon juveniles and consequently *Windom* was overruled in part by *Miller*.

The *Windom* case was cited by the Court in affirming two other juvenile fixed-life cases, both prior to the issuance of *Miller*. *State v. Draper*, 151 Idaho 576, 599, 261 P.3d 853, 876 (2011) ("We hold that Draper's fixed life sentence does not constitute cruel and unusual punishment under the United States Constitution."); *State v. Adamcik*, 152 Idaho 445, 487, 272 P.3d 417, 459 (2012) ("[T]he gravity of the first-degree murder . . . supports the severity of his

fixed life sentence.")[9]

The substantive change in the law under *Miller* provides sufficient reason for the filing of a successive petition. The Illinois Supreme Court allowed a *Miller* claim to be raised in a fourth petition for post-conviction relief because *Miller* was not available to the defendant either on direct appeal or in his previous post-conviction petitions. *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014), *cert. denied sub nom. Illinois v. Davis*, 135 S. Ct. 710 (2014). In Illinois, a successive post-conviction may not be filed unless the petitioner establishes "cause" for the failure to raise and "prejudice" resulting therefrom. The *Davis* Court found that *"Miller*'s new substantive rule constitutes 'cause' because it was not available earlier to counsel and constitutes prejudice because it retroactively applies to defendant's sentencing hearing." *People v. Davis*, 6 N.E.3d at 722.

Further, this claim is not barred by *Murphy v. State*, *supra*. Sarah does not claim she can raise the *Miller* claim now because original post-conviction counsel was ineffective. She can raise the claim now because it was not available to her during her direct appeal or during her post-conviction proceedings because *Miller* had not yet been decided and *Miller* announced a new substantive rule of law which requires a new sentencing hearing here.

3. *Miller* applies to this case

a. *Miller v. Alabama*

In *Miller*, the Supreme Court held two things. First, it held that mandatory fixed life sentencing provisions may not be applied to juveniles. It also directed that a sentencing court

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[9] Sarah believes that Ethan Windom, Brian Draper and Torey Adamcik are the only other juveniles who have been sentenced to fixed life terms in Idaho.

must undertake an analysis of "[e]verything [it] said in *Roper* and *Graham*" about youth and impose juvenile life without parole (JLWOP) sentences only in rare cases. *Miller*, 567 U.S. at ——, 132 S.Ct. at 2467. In reaching its decision, the Court clarified that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." 132 S.Ct. at 2466. The Court further clarified that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon" and indicated that the penalty is only appropriate for "the rare juvenile offender whose crime reflects irreparable corruption." 132 S.Ct. at 2470. Moreover, as noted in the dissents of Chief Justice Roberts, Justice Thomas, and Justice Alito, the prohibition against fixed life sentences will likely soon be extended to all juvenile offenders, including those convicted of homicide in states which do not mandate fixed life terms. 132 S.Ct. at 2481, 2486, 2489-90.

Miller relied on two prior cases: *Roper v. Simmons*, 543 U.S. 551 (2005), which invalidated the death penalty for all juvenile offenders under the age of 18; and *Graham v. Florida*, 560 U.S. ___, 130 S.Ct. 2011 (2010), which invalidated life without parole sentences imposed on juvenile non-homicide offenders.

In *Roper*, the Supreme Court held that the death penalty cannot be applied to juveniles. In reaching this decision, the Court looked to "the evolving standards of decency that mark the progress of a maturing society." 543 U.S. at 561. To measure this evolution, the Court looked not only at the number of states that allowed executions of juveniles, but also at the consistency of the direction of change in state laws. 543 U.S. at 566. The Court also looked to the laws of other countries and to the international authorities as instructive. 543 U.S. at 574. Lastly, the Court brought its own independent judgment to bear on the proportionality of the penalty for a particular

class of crimes or class of offenders. *Id.*

Graham and *Miller* likewise looked to the evolving standards of decency, as evidenced by state laws, direction of change in state laws, and international standards as well as the Court's own independent judgment.

In exercising its own judgment, the Court considered several factors. First, the Court made clear in *Roper* that society views juveniles as "categorically less culpable than the average criminal." 543 U.S. at 567. The Court also cited three general differences between juveniles and adults that demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders: 1) as any parent knows and as the scientific and sociological studies confirm, juveniles are less mature and responsible than adults; 2) juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and 3) the character of a juvenile is not as well formed as that of an adult. 543 U.S. at 569-70. The Court concluded that [t]hese differences render suspect any conclusion that a juvenile falls among the worst offenders." 543 U.S. at 570. "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* In short, juveniles have a lesser culpability than adults. And, this lesser culpability affects the analysis of retribution, deterrence, and rehabilitation - retribution is not proportional if the law's most severe penalty is imposed on one whose culpability is diminished by reason of youth and immaturity. And, rehabilitation is more likely as "the signature qualities of youth are transient." 543 U.S. at 570-71. Children grow up.

Roper adopted a categorical prohibition against the death penalty for juveniles because of the difficulties in judging and predicting in juvenile cases. The Court noted the likelihood that the

"brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course" and remarked that in some cases, it is even possible that the defendant's youth would wrongly be counted against him or her. 543 U.S. at 573. The Court concluded that even trained psychiatrists do not diagnose patients under age 18 as having antisocial personality disorder - and that if trained professionals do not believe that they can determine that a youth is irreparably depraved, then states cannot ask jurors to make that determination and extinguish the life and potential for a mature understanding of one's own humanity for anyone under age 18 by imposing the death penalty. *Id.*

Graham applied the same analytic framework to life without possibility of parole sentences as had been applied to death penalty sentences in *Roper*. In doing so, the Court noted that life without parole is an especially harsh penalty for a juvenile - a harsher penalty than the same sentence imposed on an adult because a juvenile will spend more years and a greater proportion of his or her life in prison than an adult. "This reality cannot be ignored." 130 S.Ct. at 2028.

The Court noted that life without possibility of parole sentences are like death penalty sentences in that they alter the offender's life by a forfeiture that is irrevocable. The sentence "deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency – the remote possibility of which does not mitigate the harshness of the sentence." 130 S.Ct. at 2027. "This sentence 'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.'" *Id.*, *quoting Naovarath v. State*, 779 P.2d 944, 996 (Nev. 1989).

The Court also noted that the developments in psychology and brain science since *Roper* continued to show fundamental differences between juvenile and adult minds. "Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." 130 S.Ct. at 2026, *citing Roper*. From both a scientific and a moral standpoint it is misguided to equate the actions of a juvenile with those of an adult. *Id.*

In determining that the proper result was a categorical prohibition on fixed life sentences for non-homicide juvenile offenders, the Court looked at the penological justifications for sentencing and held that none - retribution, deterrence, incapacitation, or rehabilitation - provides an adequate justification for the harsh sentence. The Court held that retribution does not justify imposition of the penalty because juveniles are less culpable than adults. 130 S.Ct. at 2028. Deterrence does not justify the sentence because the same characteristics that render juveniles less culpable than adults also make them less susceptible to deterrence. 130 S.Ct. at 2028-29. Incapacitation does not justify the sentence because the characteristics of juveniles make the judgment that a specific youth is incorrigible and can never be safely in the community again questionable. "A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." 130 S.Ct. at 2029. And finally, rehabilitation does not justify the penalty because the penalty forswears altogether the rehabilitative ideal. 130 S.Ct. at 2030.

Noting an on-going concern with the "unacceptable likelihood" that the brutality or cold-blooded nature of a particular crime would overpower mitigating arguments based on youth as a matter of course, the *Graham* Court determined both that a criminal procedure that failed to take into account the defendant's youth is constitutionally flawed and further that a categorical

prohibition against mandatory fixed life sentences was the proper course. 130 S.Ct. at 2030-2032.

In *Miller*, the Court again applied the same analytical framework - noting Graham's foundational principle: "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." 132 S.Ct. at 2466. And, *Miller* emphasized that this is true in all cases - even in cases involving vicious murders. 132 S.Ct. at 2469.

Miller concluded:

> We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. *Cf. Graham*, 560 U.S. at ___, 130 S.Ct. at 2030 ('A State is not required to guarantee eventual freedom,' but must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'). By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. *But given all we have said in Roper, Graham, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in Roper and Graham of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' Roper, 543 U.S. at 573, 125 S.Ct. at 1183; Graham, 560 U.S. at ___, 130 S.Ct. at 2026-2027. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.*

132 S.Ct. at 2469 (emphasis added).

Miller requires more than a generalized notion of taking age into consideration as a factor in sentencing. A sentencing court's passing reference to the defendant's youth does not eliminate need to resentence in light of *Miller* requirements. Sentencing courts are now required to apply the core teachings of *Roper*, *Graham*, and *Miller* in making sentencing decisions. *See e.g., State*

v. Simmons, 99 So.3d 28, 28 (La. 2012) (per curiam) (remanding to the district court for reconsideration of the defendant's sentence of life imprisonment at hard labor without possibility of parole imposed in 1995 in light of *Miller* and requiring the court to make findings on the record); and *State v. Fletcher*, 112 So.3d 1031, 1036 (La. Ct. App. 2013) (finding that while sentencing court considered some of the factors enumerated in *Miller*, the court's consideration lacked depth).

In light of *Miller*, the Iowa Supreme Court vacated a mandatory juvenile fixed life sentence and remanded for resentencing. *State v. Null*, 836 N.W.2d. 41 (Iowa 2013) In *Null*, the Iowa Court wrote that the district court must recognize that because "children are constitutionally different from adults," they ordinarily cannot be held to the same standard of culpability as adults in criminal sentencing due to the juvenile's lack of maturity, underdeveloped sense of responsibility, vulnerability to peer pressure, and the less fixed nature of the juvenile's character." 836 N.W.2d at 74, *citing Miller*, 132 S.Ct. at 2464. And, if a sentencing court believes a case presents an exception to this generally applicable rule, the court should make findings discussing why the general rule does not apply. *Id.*, *citing Simmons*, 99 So.3d at 28; *Fletcher*, 112 So.3d at 1036–37.

"Second, the district court must recognize that '[j]uveniles are more capable of change than are adults' and that as a result, 'their actions are less likely to be evidence of 'irretrievably depraved character.'" 836 N.W.2d at 75, citing *Graham*, 130 S.Ct. at 2026, *in turn quoting Roper*, 543 U.S. at 570; *accord Miller*, 132 S.Ct. at 2464. And, "the district court must recognize that most juveniles who engage in criminal activity are not destined to become lifelong criminals." *Id.*, *citing Miller*, 132 S.Ct. at 2464; *Graham*, 130 S.Ct. at 2029; *Roper*, 543 U.S. at 570. In other

words, the "'signature qualities' of youth are all 'transient.'" *Miller*, 132 S.Ct. at 2467, *quoting Johnson v. Texas*, 509 U.S. 350, 368 (1993). Because "incorrigibility is inconsistent with youth," care should be taken to avoid "an irrevocable judgment about [an offender's] value and place in society." *Miller*, 132 S.Ct. at 2465.

Finally, "the district court should recognize that a lengthy prison sentence without the possibility of parole such as that involved in this case is appropriate, if at all, only in rare or uncommon cases." *Null, supra, citing Miller*, 132 S.Ct. at 2469.

b. *Miller applies to non-mandatory JLWOP sentences*

While the Alabama statute in *Miller* mandated a fixed life sentence, *Miller* also applies to non-mandatory sentencing schemes. The Connecticut Supreme Court applied *Miller* to its non-mandatory sentencing scheme, writing that:

> [W]e conclude that *Miller* does not stand solely for the proposition that the eighth amendment demands that the sentencer have discretion to impose a lesser punishment than life without parole on a juvenile homicide offender. Rather, *Miller* logically indicates that, if a sentencing scheme permits the imposition of that punishment on a juvenile homicide offender, the trial court must consider the offender's "chronological age and its hallmark features as mitigating against such a severe sentence. *Miller v. Alabama, supra*, 132 S.Ct. at 2468. As the court in *Miller* explained, those features include: "immaturity, impetuosity, and failure to appreciate risks and consequences"; the offender's "family and home environment" and the offender's inability to extricate himself from that environment; "the circumstances of the homicide offense, including the extent of [the offender's] participation in the conduct and the way familial and peer pressures may have affected him"; the offender's "inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and "the possibility of rehabilitation...." *Id.*

State v. Riley, 110 A.3d 1205, 1216 (Conn. 2015). Other state appellate courts have also found that *Miller* applies to non-mandatory sentencing schemes. *See e.g., Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014) *cert. denied*, 135 S. Ct. 2379 (2015) ("*Miller* does more than ban mandatory

life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered."); *People v. Gutierrez*, 324 P.3d 245 (Cal. 2014) ("[u]nder *Miller*, a state may authorize its courts to impose life without parole on a juvenile homicide offender when the penalty is discretionary and when the sentencing court's discretion is properly exercised in accordance with *Miller* "); *Daugherty v. State*, 96 So.3d 1076, 1079 (Fla. App. 2012) (*Miller* applies to discretionary scheme). *See also, Diatchenko v. District Attorney*, 1 N.E.3d 270 (Mass. 2013) (concluding that discretionary scheme allowing imprisonment without parole for juvenile offender violates state constitution but relying on reasoning of *Graham* and *Roper* in so concluding); *State v. Long*, 8 N.E.3d 890 (Ohio 2014) (The court initially stated that "Ohio's sentencing scheme does not fall afoul of *Miller*, because the sentence of life without parole is discretionary" but later stated: "Because the trial court did not separately mention that [the defendant] was a juvenile when he committed the offense, we cannot be sure how the trial court applied this factor. Although *Miller* does not require that specific findings be made on the record, it does mandate that a trial court consider as mitigating the offender's youth and its attendant characteristics before imposing a sentence of life without parole." [Emphasis omitted.]).

Thus, *Miller*'s limitation on JLWOP sentences to a small class of juvenile offenders and its requirement that the sentencing court fully consider the effect of the defendant's juvenility at sentencing applies to Idaho sentencing proceedings.

4. *Miller* applies retroactively to this case

Miller applies retroactively to Sarah's case. In *Teague v. Lane*, 489 U.S. 288 (1989), the United States Supreme Court set out its retroactivity doctrine, in which new constitutional rules

typically are applied to cases pending on direct review but are not retroactive to cases on collateral review. *Teague* identified two exceptions to that rule: A new rule should be applied retroactively if (1) it is "substantive," - that is, "it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; or (2) "it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty"- that is, it is a "watershed" rule of criminal procedure. *Id.* at 307, 311 (plurality).

This Court adopted the *Teague* retroactivity test in *Rhoades v. State*, 149 Idaho 130, 139, 233 P.3d 61, 70 (2010), but also held that pursuant to *Danforth v. Minnesota*, 552 U.S. 264, 267–69 (2008), that it was not required to simply follow the Supreme Court's view of what constitutes a new rule or whether a new rule is a watershed rule. *Rhoades*, 149 Idaho at 139, 233 P.3d at 70. The Court noted that although the United States Supreme Court has strictly interpreted *Teague* in order to avoid excessive interference by federal habeas courts in state criminal convictions that have become final, Idaho courts do "not have a similar concern for comity when interpreting whether a decision pronounces a new rule of law for purposes of applying *Teague*." *Rhoades*, 149 Idaho at 139, 233 P.3d at 70. Rather, the Court held, in considering whether to give retroactive effect to a rule of law, Idaho courts should "reflect independent judgment, based upon the concerns of this Court and the 'uniqueness of our state, our Constitution, and our long-standing jurisprudence.' " *Id.*, *quoting State v. Donato*, 135 Idaho 469, 472, 20 P.3d 5, 8 (2001).

a. *The retroactivity issue is currently pending before the United States Supreme Court.*

The retroactivity question is pending before the Supreme Court. *See Montgomery v.*

Louisiana. 135 S. Ct. 1546 (2015) (granting Montgomery's petition for writ of certiorari.) It seems likely that the Supreme Court will find *Miller* to be retroactive since it granted relief in *Miller*'s companion case, *Jackson v. Hobbs*, —U.S. —, 132 S.Ct. 2455 (2012), which was on state collateral review. *See Jackson v. Norris*, 378 S.W.3d 103 (Ark. 2011) *rev'd and remanded sub nom. Miller v. Alabama, supra.*

However, in addition to the retroactivity question, the *Montgomery* Court directed the parties to brief and argue the following question: "Do we have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to our decision in *Miller v. Alabama*, 567 U.S. — (2012)?" Thus, it is possible that the Supreme Court will not reach the merits of the retroactivity issue. The case was argued on October 13, 2015.

b. *Irrespective of the decision in Montgomery, this Court should find Miller retroactive because Miller announced a new substantive rule*[10]

No matter how the United States Supreme Court rules, this Court should find that *Miller* is retroactive. While *Miller* set out a procedural mechanism designed to make decisions more accurate, it also changed the substance of Eighth Amendment doctrine regarding what punishments are cruel and unusual for juveniles. It is a case about proportionality under the Eighth Amendment. *See* 132 S. Ct. at 2463 (explaining that the Eighth Amendment embodies "the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense") (internal quotation marks omitted). And, it addressed whether, and

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[10] This section of the brief is a modified version of the Brief for the American Bar Association in Support of the Petitioner in *Montgomery v. Louisiana*, Supreme Court Dkt 14-280. www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/14-280_amicus_pet_AmericanBarAssociation.authcheckdam.pdf.

under what circumstances, life without the possibility of parole could be a proportional-and hence constitutional-sentence for offenders who committed their crimes as juveniles. The Court explained that this question "implicate[s] two strands of precedent reflecting our concern with proportionate punishment." *Id.*

The first strand of precedent included decisions like *Roper* (death penalty may not be imposed on juveniles), and *Graham* (life without parole may not be imposed on juveniles who did not commit homicide), which "establish that children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464. "Because juveniles have diminished culpability and greater prospects for reform," *Roper* and *Graham* hold that "they are less deserving of the most severe punishments." *Id.* at 2464 (internal quotation marks omitted). Specifically, "children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Id.* (internal quotation marks omitted). They "are more vulnerable . . . to negative influences and outside pressures." *Id.* And, perhaps most significantly here, "a child's character is not as well formed as an adult's; h[er] traits are less fixed and h[er] actions less likely to be evidence of irretrievable depravity." *Id.* (internal quotation marks and brackets omitted). Those "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 132 S. Ct. at 2465. Because minors are less blameworthy, "the case for retribution is not as strong with a minor as with an adult." *Id.* (internal quotation marks omitted). Moreover, juveniles' "immaturity, recklessness, and impetuosity" mean that they are unlikely to be deterred by "potential punishment." *Id.* Finally, a sentence of life without parole requires "making a judgment that [s]he is incorrigible-but incorrigibility is inconsistent

with youth." *Id.* (internal quotation marks and brackets omitted). For all these reasons, "life-without-parole sentences . . . may violate the Eighth Amendment" -that is, the Eighth Amendment's substantive guarantee that punishment will be proportional to the crime- "when imposed on children." *Id.*

Because *Miller* viewed a life without parole sentence for a juvenile as analogous to a death sentence-the harshest possible available sentence, which mandates that the juvenile offender will die in prison, the Court also relied on a second strand of precedent. Those decisions require "that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses." 132 S. Ct. at 2467 (*citing Sumner v. Shuman*, 483 U.S. 66, 74-76 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978)); see *id.* at 2464 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976)). "In light of *Graham*'s reasoning," the Court explained, "these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. . . . Such mandatory penalties . . . preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it," by applying the same sentence to all juvenile and adult offenders alike regardless of culpability or the likelihood of change in the future. *Id.* at 2467-68. Synthesizing these two lines of precedent, the Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." *Miller*, 132 S. Ct. at 2469. "By making youth . . . irrelevant to the imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.* Indeed, the Court noted, "given all we have said . . . about children's diminished

culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty . . . of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* (internal quotation marks omitted).

While Idaho is not a mandatory fixed life sentence state, *Miller* also held that the inherent characteristics of juvenile offenders - even those who have committed homicides - will typically render a sentence of life without parole unconstitutionally disproportionate. It required sentencing judges to give meaningful consideration to the characteristics of youth before imposing life without parole on a juvenile precisely because of the "great . . . risk of disproportionate punishment" that would otherwise exist. *Id.* Thus, both of *Miller*'s holdings are "substantive" for retroactivity purposes. In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court clarified that the first *Teague* exception applies to "substantive categorical guarantees accorded by the Constitution." *Id.* at 329. For instance, where "the Eighth Amendment, as a substantive matter, prohibits imposing the death penalty on a certain class of defendants because of their status, or because of the nature of their offense," the rule should be retroactive. *Id.* at 329- 30. That is so because "the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying [the general rule of nonretroactivity] have little force." *Id.* at 330. More recently, in *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Court gave additional content to the distinction between substantive constitutional guarantees, which apply retroactively, and merely procedural rules, which do not. "New substantive rules generally apply retroactively," "because they necessarily carry a significant risk that a defendant stands convicted of an act that

the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 351-52 (internal quotation marks omitted). Put differently, "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353. Under these principles, *Miller*'s holding is a substantive rule. Although it did not categorically bar life without parole sentences for juveniles, it nonetheless recognizes a "substantive . . . guarantee accorded by the Constitution," *Penry*, 492 U.S. at 329-the guarantee that, under the Eighth Amendment, life without parole may be imposed only on "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S. Ct. at 2469. In *Schriro*'s terms, *Miller*'s holding is substantive because there is "a significant risk that [a juvenile] defendant" sentenced before *Miller* "faces a punishment that the law cannot impose upon him." 542 U.S. at 352. As *Schriro* explained, "this Court's making a certain fact essential to the death penalty . . . would be substantive," and such a holding would be retroactive. 542 U.S. at 354. Here, *Miller* has effectively made certain facts essential to the constitutional imposition of life without parole on juveniles. Before *Miller*, every juvenile convicted of a homicide offense could constitutionally be sentenced to life in prison without the possibility of parole without the sentencing court even considering the special mitigating qualities of youth. After *Miller*, such a sentence is permitted only in the "rare" and "uncommon" case in which the juvenile's crime and character reflect irreparable corruption. Outside of that exceptional case, everyone serving a sentence of mandatory life in prison without parole for crimes committed as a juvenile is now serving a sentence that the state may not lawfully impose. Because *Miller* addressed the scope of the constitutional guarantee against cruel and unusual punishment, *Miller* established a substantive rule under the Eighth Amendment -- because it limits the range of punishment a state

may impose on a specific offender.

The Eighth Amendment cases on which *Miller* relied bolster this point. *Roper*, *Graham*, and *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring the death penalty for the intellectually disabled), have all been applied retroactively. *See e.g.*, *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (acknowledging that *Roper* has been given retroactive effect); *Moore v. Biter*, 725 F.3d 1184, 1190-91 (9th Cir. 2013) ("Thus, we hold that *Graham* is retroactive under *Teague*."); *Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002) (holding that *Atkins* applies retroactively to collateral attacks, including habeas relief). *Roper*, *Graham*, and *Atkins* are cases in which the Court held that "the Eighth Amendment, as a substantive matter, prohibits imposing the death penalty [or life without parole] on a certain class of defendants because of their status"-*Penry*'s archetype of a substantive rule. 492 U.S. at 329-30. *Miller*'s rule likewise reflects a new understanding of the Eighth Amendment's substantive guarantee; the only difference between *Miller* and *Roper*, *Graham*, and *Atkins* is that *Miller* held that the Eighth Amendment prohibits imposing life without parole on juveniles, not categorically, but in all but the very rare cases.

Miller's statement that it did not "categorically bar a penalty for a class of offenders" does not render the rule in *Miller* non-substantive. *Miller* itself makes clear that a new rule need not be categorical to be substantive. A new rule under which life without parole is only rarely a proportionate sentence for juvenile offenders is just as substantive as a new rule under which it is never a proportionate sentence. In both cases, failure to apply the rule retroactively creates "a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352.

Miller's substantive nature is made clear when its holding is applied to Idaho JLWOP

sentencing appeals. While Sarah did not raise a challenge to her sentence in her direct appeal, this Court wrote in *State v. Windom*, that "we reiterate that, in appropriate cases, a district court may impose a determinate life sentence based upon the egregiousness of the crime." 150 Idaho at 876, 253 P.3d at 313. In doing so, the *Windom* Court cited to *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991), a case where the defendant was an adult. The *Enno* Court held, "Although the sentence is a fixed life sentence with no possibility of parole, we find no abuse in the trial court's decision. Considering the heinous and cruel nature of the crime and that capital punishment was available to the trial court as an alternative based on the aggravating circumstances that were found, the trial court's decision is reasonable and within the maximum statutory limits allowed." *Id.* at 409, 807 P.2d at 627. Under *Miller*, however, a juvenile cannot be sentenced to fixed life based solely upon the egregiousness of the crime. A JLWOP sentence may only be imposed on "the rare juvenile offender whose crime reflects irreparable corruption," and then only after the sentencing court has "take[n] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S. Ct., at 2469. As this Court noted in *State v. Adamcik*: "In *State v. Windom*, this Court recently upheld the determinate life sentence of a minor, *based solely upon the nature and gravity of the offense*." 152 Idaho at 484, 272 P.3d at 456 (emphasis added). Thus, *Miller* modifies *Windom* on substantive Eighth Amendment grounds. *See also, State v. Draper*, 151 Idaho at 600, 261 P.3d 876 ("We hold that Draper's fixed life sentence does not constitute cruel and unusual punishment under the United States Constitution. . . . . 'When reviewing a fixed life sentence, the primary factors considered are the gravity of the offense and/or the need to protect society from the defendant.' *Windom*, 150 Idaho at 876, 253 P.3d at 313."); *Adamcik*, 152 Idaho at 487, 272 P.3d

417, 459 (2012) (Holding that "Adamcik's fixed life sentence does not constitute cruel and unusual punishment under Article I, section 6 of Idaho's Constitution because no gross disproportionality exists in this case," and stating that, "as noted above, a fixed life sentence for a minor was just recently upheld in *State v. Windom*.") *Miller* makes a substantive change in Idaho's law on juvenile fixed life sentences and thus should be applied retroactively.

Many state courts have found that *Miller* is retroactive because it created a new substantive rule. *See e.g., Aiken v. Byars*, 765 S.E.2d 572, 575-76 (S.C. 2014) *cert. denied*, 135 S. Ct. 2379 (2015) ("We conclude *Miller* creates a new, substantive rule and should therefore apply retroactively. The rule plainly excludes a certain class of defendants—juveniles—from specific punishment—life without parole absent individualized considerations of youth. Failing to apply the *Miller* rule retroactively risks subjecting defendants to a legally invalid punishment). *Aiken* is instructive here because South Carolina, like Idaho, does not have a mandatory life sentence scheme. The Supreme Court denied South Carolina's petition for writ of certiorari. *Id. See also, Falcon v. State,* 162 So. 3d 954, 963 (Fla. 2015) (mandatory state); *State v. Mantich*, 842 N.W.2d 716 (Neb. 2014); *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014); *Jones v. State*, 122 So.3d 698, 703 (Miss. 2013) ("We are of the opinion that *Miller* created a new, substantive rule which should be applied retroactively to cases on collateral review."); *Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E.3d 270, (Mass. 2013); *State v. Ragland*, 836 N.W.2d 107, 117 (Iowa 2013); *see also Toye v. State*, 133 So.3d 540, 547 (Fla. Dist. Ct. App. 2014).

Thus, the first *Teague* exception to non-retroactivity is present here.

c. *Miller is also retroactive because it announced a watershed rule of criminal*

procedure[11]

Even if this Court classifies *Miller* as procedural, the decision is still retroactive as a watershed rule of criminal procedure. In requiring an individualized sentencing hearing that provides consideration of a defendant's youth and its attendant circumstances before sentencing juvenile offenders to die in prison, the *Miller* Court stated that such sentences would and should be rare. 132 S. Ct., at 2469. The corollary of this assumption is that sentencing juvenile offenders to life without parole without these procedural protections is fundamentally unfair and impermissibly unreliable. *Miller*'s new rule of individualized sentencing is therefore cognizable on collateral review.

The *Teague* Court defined "watershed rules" as those "implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro*, 542 U.S. at 352 (citation omitted). *Miller* satisfies both components. The *Miller* requirement of individualized sentencing for youth facing life imprisonment is a bedrock procedural guarantee necessary for fundamentally fair sentencings. That guarantee is more than fundamental "in some abstract sense," *id.*; it necessarily improves the reliability with which Idaho courts identify the uncommon juvenile that society may condemn to a death in prison. Thus, *Miller* is an accuracy-enhancing rule under *Teague*. *Miller*'s commitment and contribution to sentencing accuracy for juveniles is beyond doubt. It is now abundantly clear that youth always matters in deciding whether to deny a juvenile any hope of release from prison. *Miller*, 132 S. Ct. at 2465. And it strictly guides the sentencer's discretion

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[11] This section of the brief is a modified version of the Brief for the American Civil Liberties Union and the ACLU of Louisiana in Support of the Petitioner in *Montgomery v. Louisiana*, Supreme Court Dkt 14-280. www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/14-280_pet_amicus_AmericanCivilLibertiesUnion.authcheckdam.pdf.

with the obligation to consider the juvenile's youth and related mitigation and find irreparable corruption on the part of the juvenile before denying all possibility of release. These protections are meant to ensure that the ultimate penalty for juveniles is "reserved only for the most culpable defendants committing the most serious offenses." *Id.* at 2467.

Miller's insistence that the sentencing court consider specific factors and its expectation that JLWOP sentences be rarely imposed also satisfies *Teague*'s insistence that a watershed rule "implicate the fundamental fairness" of a sentencing proceeding. *Teague*, 489 U.S. at 312. As with a criminal trial, a sentencing free from constitutional error at the time it became final may typically be presumed fundamentally fair. *Teague* recognized, however, "that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular [sentence]." *Id.* at 311 (1989) (citations and quotations omitted). Precisely such an alteration occurred in *Miller*. Given *Miller*'s recognition that society's "evolving standards of decency" for humane punishment have come to reject automatically sentencing juveniles to life imprisonment without parole, 132 S. Ct. at 2463, courts can no longer take for granted the fairness of a fixed life sentence, regardless of when the sentence became final, even in cases where the facts of the offense are aggravated. To the contrary, these sentences must be regarded as fundamentally unfair, since the sentencers did not have the benefit of the sentencing guidance provided by the *Miller* Court.

Miller was truly a sea change. The Court had never before recognized the right to individualized sentencing for any class of noncapital defendants. *See Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) ("Our cases creating and clarifying the 'individualized capital sentencing

doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties.") Indeed, the Court had squarely rejected in *Harmelin* the contention that a noncapital sentence could become cruel and unusual by virtue of being mandatory. *Id.* Justice Thomas, in a dissent to *Miller* joined by Justice Scalia, objected that the Court's decision in *Harmelin* precluded the result in *Miller*. *Miller*, 132 S. Ct. at 2485-86 (Thomas, J., dissenting). The *Miller* majority responded to this with the revelation - forged from *Graham* and *Roper* - that "if (as *Harmelin* recognized) 'death is different,' *children are different too*." *Id.* at 2470 (emphasis added). *Miller* essentially carved out a juvenile exception to *Harmelin*. *Miller*, 132 S. Ct. at 2470. Thus, it represents a watershed moment in criminal procedure. *See Teague*, 489 U.S. at 311- 12. Accordingly, the Supreme Court of Connecticut recently found *Miller* to have announced a watershed rule. *Casiano v. Comm'r of Correction*, 317 Conn. 52, 69, 115 A.3d 1031, 1041 (2015) ("We further conclude that the rule in *Miller* is a watershed rule of criminal procedure for purposes of our court's application of the second exception of *Teague*.)

Recognizing *Miller* as a watershed rule also accords with the spirit of *Teague*'s finality concerns with enforcing new procedural rules on collateral review. The *Teague* plurality found that federal collateral review exists mainly to incentivize state compliance with contemporary constitutional procedure. *Teague*, 489 U.S. at 306-07. With the limited provenance of habeas review, the "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application." *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (citation omitted). This balance of interests does not hold with *Miller*. The decision's roots in society's "evolving standards" of decency tip the scales

decisively against finality and in favor of sentencing fairness. That is why *Atkins v. Virginia*, is retroactive. Of course, this Court's concern with upsetting the finality of its own court's sentences is not as strong as the federal court's federalism concerns about interfering with a different sovereign's judgment. And as a practical matter, retroactive application of *Miller* will have a small effect on the District Court. To Sarah's knowledge, only four juveniles, including herself, are serving fixed life sentences in Idaho. At the same time, all four have an undeniably significant liberty interest in collateral review to reduce their inherently disproportionate sentences. As the Arkansas Supreme Court recently wrote:

> We are not unmindful of the State's arguments regarding fairness to those involved in and affected by Gordon's trial and sentencing. The State argues that Gordon received a fair trial and lawful sentence at the time of his conviction, and it would upset the expectations of all involved to vacate his sentence and have a new sentencing proceeding. Furthermore, the State argues that the costs, both in resources and human suffering, particularly that of the victim's family, should not be forgotten. These are compelling interests, but we hold that the Eighth Amendment's ban on cruel and unusual punishment outweighs the factors favoring finality.

Kelley v. Gordon, 2015 Ark. 277, 7, 465 S.W.3d 842, 846 (2015), *reh'g denied* (Sept. 10, 2015). Likewise, the costs to Idaho courts in retroactively enforcing *Miller* should not (indeed cannot) outweigh this fundamental interest in freedom from cruel and unusual punishments.

Again, the *Miller* Court's comparison of juvenile life without parole with the death penalty is instructive. Finality concerns did not prevent the Court from retroactively voiding death sentences after *Furman v. Georgia*, 408 U.S. 238 (1972), and they surely would not have prevented the Court from retroactively halting the execution of mandatory death sentences after *Woodson*, despite the institution of capital punishment surviving both decisions. It is similarly unfathomable that this Court would allow Sarah (or Ethan, or Brian, or Torey) to die in prison

after *Miller*, without first getting the now required full consideration at sentencing, simply because she has the misfortune of being on collateral review.

5. Under the logic of *Miller*, JLWOP sentences are categorically unconstitutional under the Eighth Amendment.

The two fixed life sentences imposed upon Sarah violate the Eighth Amendment because fixed life sentences for juveniles are categorically impermissible. As noted above, the dissenters in *Miller* all noted that *Miller* is "an invitation to overturn life without parole sentences" and that the prohibition will likely soon extend to all fixed life sentences even for homicides and even in states which allow judicial discretion. 132 S.Ct. at 248 (Thomas, J., dissenting). All the bases for finding the sentences unconstitutional in *Miller* including the trend of state laws, international law, and the Court's own judgment, will be applied to find JLWOP sentences unconstitutional regardless of what sentencing discretion is given to the trial court. It is worth noting that a petition for writ of certiorari is pending before the Supreme Court in *Lawrence v. Louisiana,* U.S.S.Ct. Docket No. 15-5004. That petition squarely presents the question of whether the Eighth Amendment categorically bans JLWOP sentences.

In this case, the imposition of two fixed life sentences categorically violate the Eighth Amendment. This Court should reverse the sentences and remand for further proceedings consistent with *Miller*.

6. Alternatively, *Miller* requires a resentencing where the *Miller* factors are considered.

At the sentencing hearing, Richard Worst, M.D., a psychiatrist, testified that he evaluated Sarah and found that she was believable. Tr. Vol. 9, p. 6283, ln. 19-20. He testified that Sarah is amenable to rehabilitation. Tr. Vol. 9, p. 6289, ln. 2-3. And he testified that he did not find

anything that would allow a prediction that Sarah would be prone to violence. Tr. Vol. 9, p. 6289, ln. 11-14.

Dr. Worst also testified as to the development of the adolescent brain and why the American Psychiatric Association, the American Psychological Association, the American Academy of Adolescent Medicine, and the American Academy of Psychiatry and the Law have all taken a stance against the death penalty for juveniles based upon the scientific understanding of brain development over the lifespan. Tr. Vol. 9, p. 6289, ln. 19-p. 6292, ln. 17.

Finally, Dr. Worst testified that even though he looked very hard to find evidence that Sarah had conduct disorder, he could not find any substantial evidence to support that diagnosis. Tr. Vol. 9, p. 6294, ln. 23-p. 6295, ln. 6.

Craig Beaver, Ph.D., a neuropsychologist, testified at the sentencing hearing that he evaluated Sarah. Tr. Vol. 9, p. 6367, ln. 16-p. 6368, ln. 7. He testified to the current state of the scientific understanding of brain development and that the development of the areas of the brain associated with high-level decision making, organization, problem solving, inhibitory control, and higher-level adult reasoning and functioning do not fully develop until sometime in the mid-twenties. Tr. Vol. 9, p. 6370, ln. 3-p. 6371, ln. 10.

Dr. Beaver testified that Sarah has rehabilitative potential, citing to the facts that Sarah does not have a mental health disorder, does not have a drug or alcohol dependency problem, is of average intelligence, and did not have a prior history of violence in support of the conclusion that she can eventually be successful in the community. Tr. Vol. 9, p. 6399, ln. 4-22. The testing done on Sarah does not indicate that she is a sociopath. Tr. Vol. 9, p. 6400, ln. 18-p. 6401, ln. 3. In general, the research indicates that people who have killed a parent have a very low recidivism

rate compared to other people who go to prison. Tr. Vol. 9, p. 6400, ln. 1-7. Specifically, Dr. Beaver testified that in his opinion, Sarah is not a substantial risk to reoffend. Tr. Vol. 9, p. 6413, ln. 5-p. 6515, ln. 8.

In imposing the two fixed life sentences, the District Court made only the following observations regarding Sarah's age (16) at the time of the offenses:

1. "Part of the notion here, to me at least, is that society cannot tolerate and will not tolerate a child rebelling against parents and killing them, the very people who in this circumstance were trying to protect you. And, clearly, absent any justification or excuse. That's precisely what happened here." Tr. Vol. 9, p. 6469, ln. 22-p. 6470, ln. 3.

2. "While I recognize that some of the psychological evidence presented here at this sentencing hearing was to the effect that adolescents can act impulsively, the evidence in this case is not impulsive evidence." Tr. Vol. 9, p. 6473, ln. 9-13.

3. "Another way for me to look at it is to do what I call a T account. . . . And on the mitigating side, there is in fact your age. At the time you committed these crimes, you were 16 years of age." Tr. Vol. 9, p. 6477, ln. 12-20.

4. "I think Dr. Worst is right in the sense that you have this distorted view of yourself and reality, and the truth escapes you, frankly. And I don't think it's a product of your age. I just think it's a product of your makeup that you find the fact of being truthful difficult to get a hold of." Tr. Vol. 9, p. 6489, ln. 15-20.

5. "As to Dr. Beaver's testimony about children, what I would respond is children normally don't act the way you act. You had many options to do many different things, and you chose to do what you did." Tr. Vol. 9, p. 6492, ln. 13-17.

6. "And then the state brought up this question about your age, and made the comment that you had already received the benefit of your age; and you had already received the benefit of your age because the state had not sought the death penalty. And of course, the United States Supreme Court has ruled that this is not a death penalty case. I understand it's not a death penalty case. It's never been a death penalty case." Tr. Vol. 9, p. 6492, ln. 25-p. 6493, ln. 8.

7. Following this statement, the Court reviewed the case, "pretending" it was a death penalty case to guide its discretion. Tr. Vol. 9, p. 6493, ln. 18-p. 6497, ln. 12. The Court concluded this analysis by stating, "So if, hypothetically, if this were a death penalty case, you would be a candidate for it; and that's the purpose of this exercise." Tr. Vol. 9, p. 6497, ln. 13-15.

8. "As to general deterrence, this -- the community and people in this state have to understand, and the kids in this state have to understand the first time they get grounded by – when they get grounded by their parents, I shouldn't say the first, when they get grounded by their parents when they refuse to follow family rules, when the parents are simply trying to protect them from an improper, illegal relationship, kids can't just go kill parents. We would have absolute disarray in our society if that was sanctioned behavior." Tr. Vol. 9, p. 6499, ln. 18-p. 6500, ln. 3.

Applying *Roper*, *Graham* and *Miller* to this case, an Eighth Amendment violation exists. First, the District Court did not take into account Sarah's status as a juvenile as a mitigating factor in sentencing her. The Court rejected all the defense evidence presented regarding Sarah's youth - dismissing both Dr. Beaver and Dr. Worst's testimony regarding brain development and Sarah's potential for rehabilitation and low likelihood of reoffense. Instead of considering that Sarah's youth made her less culpable than an adult, that she was more vulnerable to negative influences

and outside pressures, and that her character not as well formed and less fixed than an adult's, the Court held Sarah's youth against her.

The District Court did exactly what the Supreme Court cautioned against and forbade; it allowed the nature of the crime to overpower the mitigation arguments based on youth. The Court determined that Sarah was more deserving of the harshest possible penalty because she was a child and because the Court found that children killing parents cannot be tolerated and social chaos might result from a lesser penalty. Had Sarah been an adult who killed her parents, the Court would have, by its reasoning, given her a lesser sentence because adult children who kill their parents do not threaten the social fabric as seriously as juveniles who kill their parents do. This failure to properly consider Sarah's youth violated *Miller* and the Eighth Amendment.

Miller was also violated because this case does not present the unusual circumstances which would allow such a penalty. While the offense of conviction was violent, Sarah had no prior record of violence. There was substantial evidence that Sarah was amenable to rehabilitation. There was no evidence that she would forever be a danger to society. In fact, two experts testified that she was unlikely to reoffend and likely could eventually be safety released into the community. She is not the rare case envisioned by *Miller*.

Miller considered the legitimate penological justifications for imposing the harshest sentence possible, life without possibility of parole, on juveniles and determined that the sentence cannot be justified on the basis of retribution because retribution relates to blameworthiness and the case for blameworthiness and thus retribution is not as strong with children as with adults. The Court further found that the sentence cannot be justified by deterrence because the same characteristics that render juveniles less culpable than adults, including immaturity, recklessness,

and impetuosity, make them less likely to consider potential punishment. And, incapacitation cannot justify the sentence except where a finding can be made that the child will forever be a danger to society - a finding that "is inconsistent with youth." (In particular, that finding is inconsistent with youth in this case because both Dr. Beaver and Dr. Worst testified that Sarah cannot be said to be incorrigible.) And, lastly, the sentence cannot be justified on the basis of rehabilitation because the sentence imposed disregards the possibility of rehabilitation. 132 S.Ct. at 2465- 2469.

In this case, the imposition of two fixed life sentences cannot be reconciled with the Eighth Amendment. The sentences cannot be justified by retribution, deterrence, incapacity, or rehabilitation. This Court should vacate the sentences and remand for further proceedings consistent with *Miller*.

V. CONCLUSION

For the reasons above, this Court should reverse the order denying Sarah's request to have evidence DNA tested. It should also vacate the JLWOP sentences and remand for resentencing in light of *Miller*. It should overrule *Murphy v. State* and remand claims 2-5 for further proceedings.

Respectfully submitted this 17th day of December, 2015.

Deborah Whipple

Dennis Benjamin

Attorneys for Sarah Johnson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of December, 2015, I caused a true and correct copy of the foregoing to be deposited in the United States Mail postage pre-paid to:

Jessica Lorello
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Dennis Benjamin